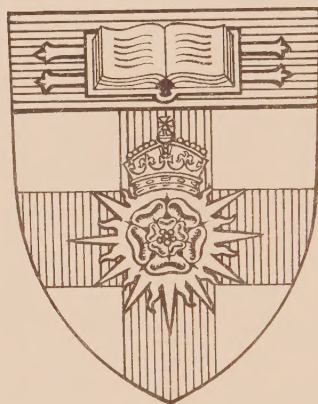


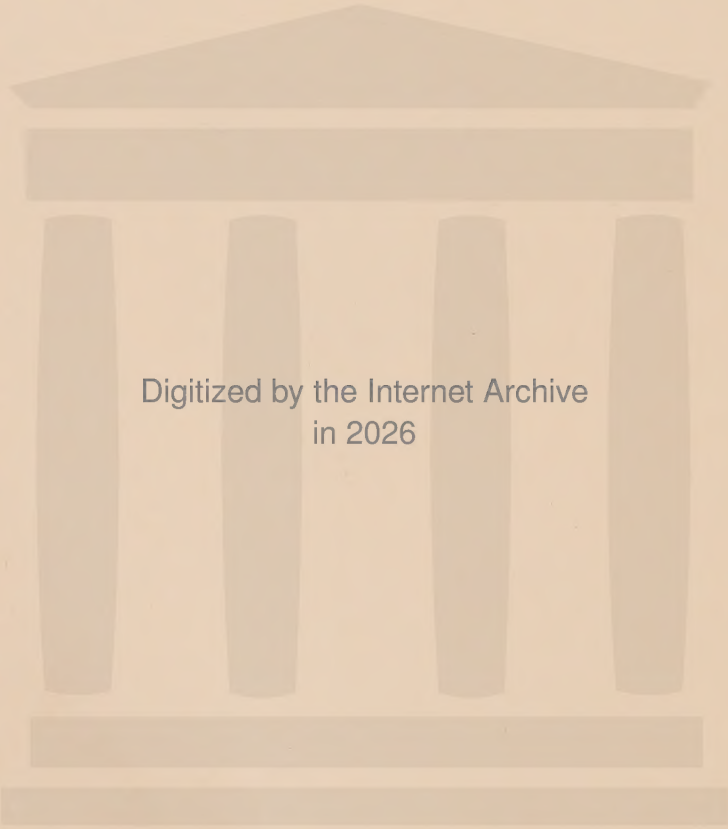
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INTERNATIONAL LAW REPORTS

YEAR 1952

EDITED

BY

SIR HERSCH LAUTERPACHT, Q.C., LL.D., F.B.A.

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OF INTERNATIONAL LAW

LONDON

BUTTERWORTH & CO. (PUBLISHERS), LTD.

1957

PRINTED IN GREAT BRITAIN



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PREFACE

THIS volume is being published at the same time as that for the year 1951. The Preface to the volume covering that year applies also to the present volume.

H. LAUTERPACHT

THE PEACE PALACE,
THE HAGUE
January 1957

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LIST OF ABBREVIATIONS

OF TITLES OF COLLECTIONS OF DECISIONS, LAW
REPORTS, PERIODICALS, ETC., QUOTED IN THE TEXT

A. (or Atl.)	=Atlantic Reporter (United States).
A.C.	=British House of Lords and Judicial Committee of the Privy Council.
A.D.	=Supreme Court of the Union of South Africa, Appellate Division.
A.I.R.	=The All India Reporter.
All E.R.	=The All England Law Reports.
A.L.R. 2d	=American Law Reports, Second Series.
Annual Digest	=Annual Digest and Reports of Public International Law Cases.
App. Div.	=Supreme Court Reports (New York), Appellate Division.
A.T.F.	=Arrêts du Tribunal Fédéral Suisse.
B.G.	=Bundesgericht (Germany).
B.G.E.	=Entscheidungen des Bundesgerichts (Switzerland).
BGHSt.	=Entscheidungen des Bundesgerichtshofes in Strafsachen (Germany).
BGHZ	=Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany).
C.A.R. (U.S.)	=Court of Appeals Reports of the United States Courts of the Allied High Commission for Germany.
C. (or Ch.) Rob.	=C. Robinson's Admiralty Reports (1799-1808).
Ch. App. Cases	=Law Reports: Appeal Cases, Chancery Division.
Ch. (or Ch.D.)	=Chancery Division of the English High Court of Justice.
C.L.R.	=Ceylon Law Reports.
Clunet	=Clunet, Journal du Droit international.
C.P.D.	=Supreme Court of the Union of South Africa, Cape Provincial Division.
Dalloz	=Recueil périodique et critique de Jurisprudence, de Législation et de Doctrine (founded by Dalloz).
Eq.	=Law Reports: Equity.
F. (or Fed.)	=Federal Reporter (United States).
F. 2d	=Federal Reporter (Second Series).
F.C.R.	=Federal Court Reports (India).

F. Supp.	=Federal Supplement (United States).
H.K.L.R.	=Hong Kong Law Reports.
H. of L. App. Cas.	=House of Lords, Appeal Cases.
I.A.	=Indian Appeals decided in the Judicial Committee of the Privy Council.
I.C.J. Reports	=International Court of Justice, Reports of Judgments, Advisory Opinions and Orders.
I.L.R.	=India Law Reports.
J.Bl.	=Juristische Blätter (Austria).
JZ	=Juristenzeitung (Germany).
K.B. (or K.B.D.)	=King's Bench Division of the English High Court of Justice.
L.Ed.	=Supreme Court Reporter, Lawyers' Edition (United States).
Ll.L.Rep.	=Lloyd's List Law Reports (England).
Ll.P.C.	=Lloyd's Prize Cases.
L.N.T.S.	=League of Nations Treaty Series.
L.R.	=Law Reports (England).
L.T.[R.]	=Law Times [Reports] (England).
M.L.R.	=Malayan Law Reports.
N.J.	=Nederlandse Jurisprudentie (Holland).
NJW	=Neue Juristische Wochenschrift (Germany).
N.Y.S[upp.].	=New York Supplement.
N.Z.L.R.	=New Zealand Law Reports.
Ob.	=Oberster Gerichtshof (Austria).
ÖJZ	=Österreichische Juristen-Zeitung.
ÖZÖR	=Österreichische Zeitschrift für öffentliches Recht.
P.	=Pacific Reporter (United States).
P. (or P.D.)	=Probate, Divorce and Admiralty Division of the English High Court of Justice.
P.C.I.J.	=Publications of the Permanent Court of International Justice: Reports of Judgments, Advisory Opinions, Orders, and Other Acts and Documents.
Q.B. (or Q.B.D.)	=Queen's Bench Division of the English High Court of Justice.
Recueil des Décisions	=Recueil des Décisions de la Commission de Conciliation Franco-Italienne (under Article 83 of the Peace Treaty with Italy, 1947).
RzW	=Neue Juristische Wochenschrift, Rechtsprechung zum Wiedergutmachungsrecht (Germany).
S.A.L.R.	=South African Law Reports.
S.Ct.	=Supreme Court Reporter (United States).

S.Ct.D.	=Supreme Court Decisions (Thailand).
Sirey	=Recueil général des Lois et des Arrêts (founded by Sirey).
S.R. & O.	=Statutory Rules and Orders published by authority (England).
SStr	=Sammlung der Entscheidungen des Obersten Gerichtshofes in Strafsachen (Austria).
SZ	=Sammlung der Entscheidungen des Obersten Gerichtshofes in Zivil- und Justizverwal- tungssachen (Austria).
T.L.R.	=Times Law Reports.
U.N.T.S.	=United Nations Treaty Series.
U.S.	=United States Reporter (Supreme Court).
U.S.C.A.	=United States Code Annotated.
VfGH	=Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofs (New Series) (Austria).
VwGH(A)	=Erkenntnisse und Beschlüsse des Verwal- tungsgerichtshofes, New Series (Admini- strative Law) (Austria).
VwGH(F)	=Erkenntnisse und Beschlüsse des Verwal- tungsgerichtshofes, New Series (Law re- lating to Finance) (Austria).

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- III. SUBJECTS OF INTERNATIONAL LAW. *See also* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW : A, In General ; *and* PART VIII, TREATIES : IX, Operation and Enforcement of Treaties.
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PART I

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[See also PART X, DISPUTES: A, I, ii, Arbitration: The Law Applied by Arbitral Tribunals.]

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See Case No. 51 (*Case Concerning Rights of Nationals of the United States of America in Morocco* (France v. U.S.A.)).

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[See also PART VIII, TREATIES: IX, Operation and Enforcement of Treaties, Necessity for Municipal Legislation; and PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.]

International Law—Relation to Municipal Law—Treaties—Operation and Enforcement of—Superiority over Municipal Laws—French Constitution of 1946—Aliens—Treatment of—Exercise of Commerce.

Case No. 1

MINISTÈRE PUBLIC v. COT-RIERA.

France, Court of Appeal of Riom. December 11, 1952.

THE FACTS.—This was an appeal by the Public Prosecutor against a decision of a lower Court acquitting Cot-Riera, a Spanish national, on a charge of having kept a pastry-shop without possessing the permit entitling an alien to engage in commerce. It was contended by the Public Prosecutor that failure to obtain that permit was punishable under a Decree-Law of November 12, 1938. It was contended on behalf of Cot-Riera that he was not required to obtain such a permit since the Franco-Spanish Convention of January 7, 1862, assimilated Spanish nationals in France to French nationals with respect to the exercise of commerce.

Held: that the judgment of the Court below must be affirmed. The Decree-Law of November 12, 1938, could not override an international treaty. The Court said:

“The legal question at issue is whether the diplomatic Convention of 1862 overrides the Decree-Law of November 12,

**Case
No. 1
Contd.**

1938, which is an internal French law. This, in turn, raises the question whether the Decree-Law is an instrument of international public policy. That Decree is exactly the same in nature as the Decree of May 14, 1938, concerning the conditions of residence of aliens in France, and that of the following June concerning the protection of French commerce. All these instruments have the same purpose; . . . they are all based on two Laws: one of which was a continuation of the other . . . The Decrees of May 14 and June 17 both contained a provision expressly reserving the effects of earlier treaties; accordingly, neither was an instrument of international public policy, and the Decree-Law of November 12, 1938, accordingly also is not such an instrument.

"We may even go further. Even if it was admitted that the Decree-Law of November 12, 1938, was, at the outset, an instrument of international public policy, this undoubtedly ceased to be so from the day when the Constitution of October 27, 1946, entered into force. Articles 26 and 28 of that Law expressly affirm the principle of the superiority of treaties over French municipal law. The effect of the Constitution of 1946 is not only that in future no French law can be an instrument of international public policy, but that all earlier laws cease to have that character."

[Report: *Dalloz hebdomadaire*, 1953, Jurisprudence, p. 123.]

International Law—Relation to Municipal Law—Binding Force before Municipal Courts of Decisions of the International Court of Justice.

See Case No. 67 (*Administration des Habous v. Deal*).

International Law—Relation to Municipal Law—Allied Control Agreement on "German Property"—Agreement Prohibiting Owners' Right of Disposal—Whether Agreement Affects Right of Ownership—The Law of Austria.

See Case No. 141 (*Continentrale Motorschiffahrts-A.G. v. Federal Ministry of Transport*).

International Law—Relation to Municipal Law—"Generally Recognized Rules of International Law"—The Italian Constitution.

See Case No. 43 (*Castiglioni v. Federal People's Republic of Yugoslavia*).

International Law—Relation to Municipal Law—Doctrine of Automatic Incorporation—Hague Convention of 1907 Respecting the Laws and Customs of War on Land—The Law of Italy.

See Case No. 137 (*Ligabue v. Finanze*).

International Law—Relation to Municipal Law—French Constitution of 1946—Absence of Conflict between International and Municipal Law.

See Case No. 64 (*In re Coll* (No. 1)).

International Law—Relation to Municipal Law—French Constitution of 1946.

See Case No. 105 (*In re Banolas*).

International Law—Relation to Municipal Law—French Constitution of 1946.

See Case No. 66 (*Ministère Public v. S.*).

International Law—Relation to Municipal Law—Recognition of Foreign Judgments Contrary to a Treaty.

See Case No. 9 (*Foreign Judgments (Treaty of Lausanne) Case*).

International Law—Relation to Municipal Law—Interpretation of Municipal Legislation in Light of International Law.

See Case No. 27 (*Nisyros Mines Case*).

PART II

STATES AS INTERNATIONAL PERSONS

A—IN GENERAL

I.—The Beginning of State Existence

[For Recognition *see below*, D.]

Case No 2 **States—Beginning of Existence of—Factual Existence—
Republic of the South Moluccas—Right of Self-Determination
—Right to Sue—Proprietary Rights of New State—Statement
of Executive as to Independent Status.**

REPUBLIC OF THE SOUTH MOLUCCAS *v.* NETHERLANDS NEW GUINEA.

*Dutch New Guinea, Court of Justice at Hollandia
(by prorogation). March 7, 1952.*

THE FACTS.—On or about May 5, 1950, the Republic of the South Moluccas (Republik Maluku Selatan—R.M.S.) shipped to Sorong (Netherlands New Guinea) a parcel of copra. On arrival the copra was attached by the New Guinea authorities and sold to the New Guinea Import and Export Company for some f.20,000 New Guinea currency. The money was paid by the New Guinea authorities into the Treasury of New Guinea as sequestrator. The R.M.S. applied first to the Governor of New Guinea and then to the Netherlands Minister for Union Affairs and Overseas Territories for payment. Both these authorities refused, however, to pay out the money except to a person who was declared by a court of justice to be entitled thereto. Thereupon R.M.S. in its capacity as a legal person or corporation under civil law brought an action for payment of the money.

Held: that the action must succeed. The Republic of the South Moluccas existed as a State and therefore possessed legal personality, with the legal capacity to sue. The money claimed belonged to, and must be paid out to, the Republic. The Court said:

“ It must first be ascertained whether this claim, instituted by the R.M.S., is admissible, that is, whether for the purposes of this action the R.M.S. possesses legal personality. The Court, adopting and concurring in the views expressed in the

judgment of the Court of Appeal at Amsterdam of January 8, 1951,¹ is of opinion that the R.M.S. represents the population of the South Moluccas, which, desiring no longer to acquiesce in the replacement of the Federal Constitution by the Unitarian Constitution, and availing itself of the right of self-determination guaranteed by the Agreement of Linggadjati of March 25, 1947, the 'Renville Principles' of January 17, 1948, and the Round Table Conference Agreements of 1949, took its political destinies into its own hands and proclaimed the Republic of the South Moluccas on April 25, 1950. By the proclamation of this Republic the population of the South Moluccas separated itself entirely from the Republic of Indonesia, severed all ties with that Republic, and from that date began to act, both internally and externally, as an absolutely independent, autonomous and sovereign State, governed by a Head of State and a complete Cabinet. The R.M.S. from the moment of its proclamation carried on the normal administration of its territory and continued undisturbed to exercise its authority as a sovereign Government, all of which facts are evidenced by the statement made by the witness A. Wairisal,² who still holds office as Prime Minister of the R.M.S. According to him, the R.M.S. carried on an administration continuously in

¹ See *International Law Reports*, 1950, Case No. 39 (*Republic of the South Moluccas v. Royal Packet Steamship Co.*).

² This statement, after setting out the main reasons for the separation of the South Moluccas from the Republic of Indonesia, showed how, "relying on the right of self-determination to which they were entitled", the Amboinese proclaimed the independent and sovereign Republic of the South Moluccas. "This proclamation was made on April 25, 1950, at Amboina in the Government Office and was communicated to the deputy Kepala Daerah (head of the province); it was promulgated over the wireless and by means of printed proclamations which were circulated all over the R.M.S. territory. Mr. Manuhutu was proclaimed President of the Republic, and a complete Cabinet was formed, with the witness as Prime Minister. The vast majority of the people was in favour of the Republic of the South Moluccas, with the exception of a few Islamic areas which inclined towards the Republic of Indonesia. The Government machinery functioned normally, and the administration continued on the same lines as previously. The R.M.S. forces, after fierce engagements with the Indonesian Army, left the Island of Amboina in December 1950 owing to the scarcity of food, crossed over to Ceram together with the Government of the R.M.S., and succeeded in holding their own there against the Republic of Indonesia until the witness left the Island on October 30, 1951. In Ceram, too, the Government machinery functioned normally, and no difficulties were experienced with the population. Taxes there were paid in money and in kind; the R.M.S. controlled the whole of the interior of Ceram, the north coast of Wahai as far as Boela, and the south coast from Piroe to Amahai. In May 1951, the Cabinet resolved to send abroad a Commission, consisting of twenty members, to seek support for the cause of the R.M.S.; the witness was one of the members of this Commission, and he and his companions succeeded in running the blockade and reaching the Island of Misool, Netherlands territory. At present Dr. Ch. Suomokil is Prime Minister *ad interim* and Minister of Justice. The R.M.S. Government is still established in Ceram, or was at least until October 30, 1951. Since leaving Ceram the witness has no longer had any contact with that Island, and he is not in a position to state whether the situation there has undergone any change."

the Island of Ceram, to his knowledge until November 1951. Consequently, the R.M.S. may be held to have acted at least for a certain period of time *de facto* as an independent, autonomous and sovereign State, from which it follows that it has legal personality, with capacity to sue and be sued. The claim instituted by the R.M.S. is therefore admissible.

"As to the plaintiff's proprietary rights (based on possession of movable property), it may be observed that, in consequence of the fact that the ties with the Republic of Indonesia have been severed, all the governmental powers and rights, and therefore also all concern with native products in the South Moluccas, have automatically passed to the R.M.S. Therefore, neither the Republic of Indonesia itself nor the Coprafonds at Macassar, the agency of that Republic which dealt with matters concerning copra, which was formally an organ of the State of East Indonesia, had any rights in respect of the parcel of copra in issue. The plaintiff has produced in support of its claim a Bill of Lading dated May 4, 1950, relating to the parcel of copra in question, from which it appears that this shipment was effected only nine days after the proclamation of the R.M.S. It has not so far been proved that the plaintiff is not a holder in due course of this Bill of Lading, so that it must be assumed that the plaintiff is a holder in due course and consequently entitled to the copra. Since this parcel of copra has been sold by the defendant, the purchase monies which represent it and which have been put under sequestration by the defendant must be regarded as belonging to the plaintiff."

[Report: *N.J.*, 1953, No. 100.]

II.—Sovereignty and Independence

i.—In Foreign Relations

[See also below, IV, Recognition of Acts of Foreign States and Governments; PART IV, JURISDICTION; and PART VIII, TREATIES; XII, Interpretation of Treaties, ii, Principles and Rules of Interpretation.]

States—Foreign Relations—Agencies Competent to Determine whether a Treaty has been Extinguished.

See Case No. 14 (*Landis & Gyr A.G. v. W. H. Goens & Co.*).

iii.—Conduct of Foreign Relations. Conclusiveness of Statements of the Executive

Conclusiveness of Certificates of the Executive Department —Whether Endorsements on a Passport are Official Certificates—Legal Nature of a Passport—Whether Passport a Public Document—Admissibility in Evidence—The Law of Southern Rhodesia. Case No. 3

HASSIM *v.* NAIK.

Union of South Africa, Supreme Court, Appellate Division, Sitting as Court of Appeal from the High Court of Southern Rhodesia.

(Centlivres C.J. ; van den Heever J.A. ;
Newton Thompson A.J.A.)

May 19, 1952.

THE FACTS (*per* Centlivres C.J.).—"The respondent sued the appellant in the High Court of Southern Rhodesia in an action in which he claimed transfer of a certain piece of land in terms of a deed of sale dated November 21st, 1945. The appellant pleaded that he was a minor at the time when he signed the deed of sale and that the deed did not receive the authorisation of the Court in terms of sec. 92 of the Administration of Estates Act (Chap. 47).

"The appellant's mother stated in evidence that she married her late husband, who died in 1943, in Porbandar in India. Two and three-quarter years after her marriage her husband left India but she remained behind in Porbandar. He returned to Porbandar after nine years and about ten months after his return she gave birth to the appellant. The witness found a passport (which was shown to her in Court and identified by her) among her husband's effects after his death. Appellant's counsel sought to put in the passport as evidence to show when the appellant's father left Southern Rhodesia to go to India and when he arrived in India. Respondent's counsel objected to the production of the passport but admitted that it was a genuine Southern Rhodesian passport, issued in Southern Rhodesia and bearing the signature of the Governor of Southern Rhodesia.

"Beadle J., who heard the case, ruled that the passport was inadmissible in evidence. At the conclusion of the case he gave judgment for the respondent in terms of his claim on the ground that the appellant had not discharged the *onus* of proving that he was a minor at the time when he signed the deed of sale.

Case
No. 3
Contd.

"In the appellant's heads of argument it was contended that the learned trial judge had erred in finding on the evidence, which was given, that the appellant had not discharged the *onus* which rested on him, but Mr. Gould, who appeared for the appellant at the hearing of the appeal, informed the Court that he would not raise that contention and that he would confine himself to contending that the trial Court had erred in holding that the passport was inadmissible in evidence."

Held: that the appeal must be dismissed. A passport was not a public document, and, therefore, not admissible as an exception to the general rule against hearsay evidence. Endorsements thereon were only admissible in evidence if it was proved that they were made by persons with express statutory or judicial authority.

I. *The Legal Nature of a Passport. Whether or Not it is Admissible in Evidence as a Public Document. Definition of "Public Document".*—The Chief Justice said:

"The evidence provided by the passport to show when the appellant's father arrived in India would be hearsay. As a general rule hearsay evidence is inadmissible and the question at issue is whether this is one of those exceptional cases where hearsay evidence of the nature of that which is sought to be given is admissible. . . ."

"Even if the passport were admissible in evidence, the endorsements referred to would not prove themselves. None of the endorsements were authenticated and it is clear that without authentication none of them could be admitted in evidence. The passport was rejected by the trial Court not on the ground of lack of authentication but on the wider ground that it contained hearsay evidence and that this was not one of those exceptional cases where hearsay evidence is admissible. . . ."

II. *The Legal Nature of Endorsements on a Passport. Whether or Not They are Admissible in Evidence as Official Certificates. Definition of "Official Certificates".*—" . . . There is no doubt that a passport is, *inter alia*, an official certificate of the bearer's identity and nationality and it may be that it would be admissible in evidence to prove those facts. There is nothing in the judgments in *Sachs'* case¹ to suggest that endorsements made in a passport are official certificates but, assuming that such endorsements can be so regarded (we have no evidence to show that the persons who made the endorsements were under a duty to make them) the question arises whether on that basis they would be admissible in evidence. .

¹ *Sachs v. Dönges*, N.O.: 1950 (2) S.A.L.R. 265; see *International Law Reports*, 1950, Case No. 7.

I should add that in the instant case it is clear that the passport was tendered not merely to prove the identity of the bearer but to prove by means of an endorsement that he was in India in July, 1924.

"*Phipson* [*On Evidence*] in dealing with the admissibility of official certificates, letters and returns (8th ed., pp. 356 and 357) says that at Common Law 'a certificate of a mere matter of fact not coupled with matter of law, remains generally speaking inadmissible, though given by a person in an official position, or even, it is said, by the Sovereign under the sign-manual (*Omichund v. Barker*, Willes 538, 549-550; but see *Mighell v. Johore (Sultan)*, (1894) 1 Q.B. 149). If, therefore, the person is bound to record the fact, the proper evidence is a copy of the record duly authenticated; but as to matters which he is not bound to record, his certificate, being extra-judicial, is merely the unsworn statement of a private person and will be rejected. Certain exceptions, however, have been allowed to this rule, partly on the historical analogy mentioned above, and partly on grounds of convenience, although the cases themselves are neither uniform nor very satisfactory.'

"... The passage in the judgement in *Omichund v. Barker* referred to by *Phipson* is as follows (I am quoting from 125 E.R. at p. 1316): 'Our law never allows a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence. Even the certificate of the King, under his sign manual, of a matter of fact (except in one old case in Chancery, Hob. 213), has been always refused . . . Besides it is not the best evidence that the nature of the thing will admit.'

"... It will be noted that *Phipson* in the quotation I have given above seems to contrast *Omichund's* case, with the case of *Mighell v. Sultan of Johore*. The two cases are not *in pari materia*. In the later case Lord Esher, at p. 158, expressed the opinion 'that, when once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the courts of this country is decisive.'

"The rule enunciated by Lord Esher, M.R., is referred to in the text books on evidence but as Viscount Finlay pointed out in *Duff Development Co. v. Kelantan Government*¹ 1924 A.C. 797 at p. 813, information supplied to the Court by His Majesty's Government 'is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance.' In that case Viscount Finlay approved of the

¹ See *Annual Digest*, 1923-1924, Case No. 65.

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judgment of Farwell, J., in *Foster v. Globe Venture Syndicate*, 1900 (1) Ch. 811—judgment which may usefully be referred to in this connection. The rule referred to by Lord Esher seems to be a rule of constitutional law rather than a rule of evidence . . . in any event the rule has no application to the facts of the present case and cannot be regarded as an exception to the ruling in *Omichund's* case as qualified by *Wigmore*.

"*Phipson* at p. 358 and *Halsbury* (Vol. 13, para. 732 note (g)) quote *Whaley v. Carlisle*, 17 Ir. C.L.R. 792, as laying down the proposition that a passport granted by an English Secretary of State is evidence that the person described therein was abroad at a given date . . . At the trial of that case some point was made of the fact that the plaintiff's father did not proceed with an action to have a certain deed set aside. One of the suggestions made by the plaintiff to account for the non-prosecution of his rights by his father was that at that time his father was a prisoner in France. It was sought to prove this by putting in a copy of a passport issued to the plaintiff's father and attested to be a true copy of the original passport which was in the French archives at Paris. It was shown that the plaintiff's father had been detained as a prisoner of war in France during the war which commenced in 1803 between the United Kingdom and France and that his passport was properly deposited in the archives at Paris. The original passport bore the date April 22, 1803, and was signed by Lord Hawkesbury, Principal Secretary of State for Foreign Affairs to King George the Third. Objection was taken to the admissibility of the passport on the ground that 'the Judges are not bound to take judicial notice of who were the persons who held any of the offices of State at any particular period, and therefore there is no evidence as to Lord Hawkesbury's having been Secretary of State for Foreign Affairs on April 22, 1803.' This objection was overruled and Monahan, C.J., in giving judgment on appeal said at p. 815: 'We are all of opinion that the document (*i.e.* the passport) was properly received in evidence, the Court taking judicial notice of the great Officers of State. It was contended that this was not true to an unlimited extent; that we must stop somewhere, and that the Court cannot take judicial notice of an event which happened so long ago. We have, however, come to the conclusion that the Court ought to know that Lord Hawkesbury was Foreign Minister in 1802 [*sic.*]; and, therefore, that the evidence was properly received at the trial.' . . ."

Sovereignty—Conduct of Foreign Relations—Conclusiveness of Statements of the Executive—Recognition of Governments.

See Case No. 19 (*Gydnia Ameryka Linie, etc. v. Bogustawski and Another*).

Sovereignty—Conduct of Foreign Affairs—Conclusiveness of Statements of the Executive—Certificate of British Office of Commonwealth Relations.

See Case No. 45 (*Sayce v. Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State*).

IV.—Recognition of Acts of Foreign States and Governments

[See also below, D, Recognition of States, Governments, Belligerency; and PART IV, JURISDICTION: I, Territorial.]

Recognition of Foreign Legislation—Foreign Confiscatory Decrees—Effect of Nationality of Property-Owner Upon Recognition of Foreign Confiscatory Decrees. Case No. 4

SULYOK v. PENZINTEZETI KOZPONT BUDAPEST.

United States, Supreme Court of New York, Appellate Division.
March 11, 1952.

THE FACTS.—The plaintiff, formerly President of the defendant Hungarian Bank, was, it was found on a jury trial below, discharged without cause on August 9, 1947. It was further found that the defendant had repudiated all its obligations under the employment contract between it and the plaintiff. The plaintiff had fled from Hungary soon after his dismissal. In October 1947, a decree had been issued depriving the plaintiff of Hungarian nationality. The plaintiff, establishing jurisdiction of the Court by the attachment of funds of the defendant in New York, sued to recover damages for the breach of his contract of employment, including the repudiation of his pension rights. On appeal from a judgment in the plaintiff's favour, the defendant contended, *inter alia*, that decrees of the Hungarian Government issued in 1948, which reduced pensions and prohibited their payment to persons who had departed from Hungary for more than three months, were a valid defence against the plaintiff's pension claim. On this question, it was

Held: that the Decrees were not a valid defence and that the judgment of the Court below must be affirmed.

The Court said: " If the doctrine of anticipatory breach of contract applied to an agreement for the payment of money in

Case
No. 4
Contd.

the future by way of pension or annuity, there could be little doubt that defendant's basic obligations to pension plaintiff was disclaimed. Defendant contends that plaintiff's deprivation of citizenship and the 1948 communist decrees were valid acts by a foreign government recognized by the United States, and that the Courts of New York ascribe to them full force and effect citing *Dougherty v. Equitable Life Assurance Soc.*, 266 N.Y. 71, 193 N.E. 897. The most that could be claimed for that case would be that confiscatory Soviet decrees are binding upon our Courts in the case of an insurance policy issued in Russia to a Russian, payable there in Russian money by an insurance company licensed to do business under Russian law. *United States v. President and Directors of Manhattan Co.*, 276 N.Y. 396, 12 N.E. 2d 518, however, as well as the concurring opinion by Lehman J. in the *Dougherty* case, indicate that our public policy does not require us to enforce foreign decrees of confiscation, even by recognized countries, against persons who were not citizens of those States at the time when the edicts of confiscation were issued. In the instant case, plaintiff's Hungarian citizenship had been revoked and he was living in exile when his pension rights were finally and completely repudiated in 1948. These decrees were therefore not binding upon him, nor can defendant successfully assert them as a defense since (unless they bound plaintiff) they were invalid and ineffective as contrary to our public policy. *Plesch v. Banque Nationale de la République D'Haiti*, 273 App. Div. 224, 77 N.Y.S.2d 43, and cases cited, affirmed 298 N.Y. 573, 81 N.E.2d 106."

[Reports: 111 N.Y.S. 2d 75, 279 A.D. 528; affirmed, 304 N.Y. 742, 107 N.E. 2d 604.]

Case
No. 5

Recognition of Acts of Foreign Governments—Confiscation of Property—Territorial Effect of—Situs of Debt.

CONFISCATION OF PROPERTY (BERLIN) CASE.

German Federal Republic, Federal Supreme Court.
February 1, 1952.

THE FACTS.—The plaintiffs, in the course of their business as bankers in a part of Berlin (Germany) which was subsequently, upon the conclusion of hostilities in the Second World War, occupied by the armed forces of the Soviet Union, made a loan to a partnership carrying on business in the same part of Berlin. After the end of hostilities two of the partners of the partnership took up residence in that part of Germany which was occupied by the Western Powers (hereinafter referred

to as "Western Germany"). The assets of the plaintiffs' business in Berlin were confiscated by order of the Soviet authorities. The plaintiffs, however, had assets in Western Germany which enabled them to carry on business there. They now brought an action against one of the two partners of the partnership who had taken up residence in Western Germany (and who, according to German law, was personally liable for the debts of the partnership), claiming repayment of the loan made to the partnership prior to the occupation of Berlin. On behalf of the defendant it was contended that the plaintiffs were not entitled to bring the action, on the ground that their claim against the defendant had been expropriated, together with their other assets in Berlin. On behalf of the plaintiffs it was contended that their claim against the defendant was situate in Western Germany, where the defendant was resident, and that as the operation of the confiscation of their property in Berlin was territorially limited to Berlin, it did not affect their claim against the defendant.

Held: that as the confiscation of the plaintiffs' assets in Berlin did not affect the plaintiffs' property in Western Germany where the claim against the defendant was situate, the plaintiffs were entitled to succeed. The Court said:

"The Berlin office of the plaintiffs was closed by order of higher authority. This was obviously the result of measures taken in the course of the general expropriation of private banks in the Soviet Zone and in the Eastern sector of Berlin. It is generally agreed, by writers and courts of law alike, that business enterprises which have been carrying on business in the East, irrespective of whether or not their names have been removed from the commercial register in the Eastern Zone, have not lost their legal personality, particularly if they have assets in the Western Zones. This follows from the general principle of international law, which is applicable by analogy to inter-local legal relations, that measures of requisition and confiscation are limited in operation to the territory of the Power which has enacted them. The continued existence of the plaintiffs in the West did not require a formal removal of their registered office. The result of such a requirement would have been that, in the absence of formal removal, such of the assets of a firm expropriated in the East as were situate in the West would have become *bona vacantia*. It is obvious that this cannot be the law. The view that the defendant might also be held liable at the suit of that part of the plaintiffs' business which was situate in the Eastern sector of Berlin is ill-founded. Such liability cannot arise, because the claim forming the subject-matter of this action is not affected by

Case
No. 5
Contd.

the confiscation and does not therefore form part of the assets of the entity which is entitled to the confiscated property of the plaintiffs situate in the East. Only such assets can be the subject of seizure by means of sovereign acts of State as are situate within the sphere of power of the State which has ordained the act of seizure. According to German private international law, a claim is situate where the debtor has his residence at the material time. This is now generally accepted as being the law. . . ."¹

[Report: NJW, 5 (1952), p. 540.]

Case
No. 6

Recognition of Acts of Foreign States—Confiscatory Legislation—Extra-territorial Effect of—Foreign Bank as Mortgage Creditor—Nationalization of Foreign Bank—Discharge of Mortgage Debt by Payment to State Enterprise Substituted for Expropriated Creditor Bank—Whether Valid Discharge of Debt—Relevance of Debtor's Good Faith.

DISCHARGE OF MORTGAGE DEBT (GERMANY) CASE.

*German Federal Republic, Court of Appeal of Frankfurt.
June 27, 1952.*

THE FACTS.—The appellants were owners of real property situate in Western Germany on which they had raised a mortgage some time before the conclusion of hostilities in the Second World War, the mortgagees being a bank carrying on business in what subsequently became known as Eastern Germany. In 1946 the Bank was expropriated by order of the Soviet military authorities (and a law subsequently enacted) who were in occupation of Eastern Germany, and the property of the Bank was vested in a State enterprise. The latter continued to demand from the appellants payment of interest on the mortgage debt, and ultimately also repayment of the capital sum. In 1947 the appellants discharged the mortgage debt by paying the capital sum to the State enterprise, which purported to grant them a discharge. In accordance with German law the appellants thereupon applied to the Land Registry for the cancellation of the mortgage to which they would have been entitled if the discharge of the debt had been a discharge valid in law. The trustee of the expropriated creditor Bank in Western Germany, however, lodged a complaint against the cancellation of the mortgage, on the ground

¹ See also the judgment of the Federal Supreme Court of October 17, 1952 (BGHZ, 7 (1953), p. 302), in which it was held that a debt owing by a debtor in Western Germany to a creditor in Eastern Germany was situate in the West and accordingly not affected by the expropriation of the creditor's business in the East.

that the expropriation of the creditor Bank had no extra-territorial effect and was therefore invalid in Western Germany. He accordingly contended that the expropriated Bank was still the true mortgagee and that the payment of the mortgage debt to the State enterprise did not constitute a valid discharge of the appellants' liability under the mortgage. The trustee's complaint, in accordance with the relevant provisions of German law, was duly registered as a land charge, and the appellants appealed against such registration.

Held: that the trustee's complaint against the cancellation of the mortgage was justified, irrespective of whether or not the appellants had made the payment to the State enterprise in good faith, and that the appeal against the registration of the trustee's complaint as a land charge must be dismissed. The Court said:

"The Court below was right in law in acting on the premise that the L-Bank did not become the successor in title of the S-Bank. With regard to this question, the Court shares the view, which is recognized in doctrine and in case law, that confiscatory measures . . . are of strictly territorial application. This rule of territoriality, which is a rule of international law, must be applied to inter-zonal and inter-local legal relations originating in Germany. The lower Court therefore gave the correct reasons for its finding that the written consent given to the cancellation of the mortgage was given by a person not entitled to do so, and that the registration of the complaint was rightly made. We also agree with the lower Court that the appellants are not entitled to claim the protection due to persons who have acted in good faith. The appellants contend that they are entitled to such protection in the same manner as they would be if this were a dispute between two creditors. This view is not correct. The relevant provisions of the Civil Code which provide for the protection of the debtor *vis-à-vis* the old and the new creditor cannot be applied because there is no such relationship between old and new creditors in the present case. As we have already pointed out, the L-Bank did not, at any time, become the successor in title of the S-Bank, or a new creditor, with regard to the mortgage situate in the West and the money claim on which such mortgage is based. . . ."

[Report: NJW, 6 (1953), p. 105.]

Case
No. 7

Recognition of Acts of Foreign Governments—Extra-territorial Effect of—Nationalization Decrees—Territorial Limitation of Commercial Debts—Whether Payable to Nationalized Enterprise—*Lex situs* of Debt.

HAHN RÖHREN-WALZWERK v. STOKVIS
(BÁNSKÁ À HUTNÍ SPOLEČNOST NARODNÍ PODNIK,
Intervenors).

Holland, District Court of Arnhem. March 22, 1951.

Court of Appeal of Arnhem. March 11, 1952.

THE FACTS.—The plaintiffs, a German limited liability company, had commenced an action against the defendant, a Netherlands company, based on a contract entered into between them before 1940. Bánská à Hutní Společnost Narodní Podnik, a nationalized enterprise under Czechoslovak law, asked for leave to be joined in the proceedings on the ground that the contract with Stokvis had been concluded not by the Röhren-Walzwerk of Berlin, but by three individuals who then constituted together an “*offene Handelsgesellschaft*” under Czechoslovak law under the firm name of Albert Hahn Röhren-Walzwerk, of Prague, as enrolled in the commercial register there. The latter company had since been nationalized under a Decree of the President of the Czechoslovak Republic (*Collection of Laws*, No. 100/1945), as a consequence of which, it was contended, its assets had passed to the intervener on the strength of a further Executive Decree of the Czechoslovak Minister of Industry, No. 833, dated March 7, 1946. Under Article 2 (4) of the main Decree, the nationalization included all outstanding claims of the companies thus nationalized. On these grounds the intervener claimed to be solely entitled to receive payment of monies due under the original contract.

Held (by the District Court): that the application must be refused. It appeared from the documents submitted to the Court by the intervener that the Czechoslovak company Albert Hahn (Odenberger Eisen- und Stahlwerke) G.m.b.H. of Prague had indeed been nationalized on October 27, 1945, and that the intervener itself had on March 7, 1946, been constituted as a national enterprise (*narodní podnik*), to which all the company's assets, as far as actually nationalized, were, with only a few exceptions, transferred. According to section 13 of the main Decree of 1945, these national enterprises were in the nature of independent legal entities. They therefore had *persona standi in judicio*. But even on the assumption that the private company's assets were in general nationalized and thus passed to the “*narodní podnik*”, it remained to be considered

whether the claim before the Court was included in the nationalization. In deciding this question the Court started from the proposition that nationalization is a means of acquisition of ownership, and so comes under the law of property.

The Court said: "What is included in a particular nationalization depends therefore not only upon the content of the law of the nationalizing State, but also upon the extent of the territorial operation of that law. For it is a rule of the law of property that nationalization does not produce any effect outside the frontiers of the country where it takes place. The decision on Banská's application for leave to be joined in the action depends, therefore, solely on the question where a particular claim of rights based on a contract must be treated as situate." The Court cited with approval Kusters, *Het internationaal burgerlijk recht in Nederland*, p. 751, to the effect that although such a contractual right is among the creditor's assets, the place where that asset is to be looked upon as situate is the domicile of the debtor, who keeps it under his control until the debt is finally paid. This conclusion was supported by the consideration that the creditor will usually have to try to enforce his right in the Courts of the debtor's domicile, where the debtor's other creditors will also be forced, if necessary, to take action to protect their rights. (The Court here referred to Niboyet, *Traité de droit international privé français* (1947), Vol. IV, No. 1297, who reaches the same conclusion when examining the situs of a chose in action in the context of a general discussion of the territorial effects of a foreign nationalization.) It followed from this that in any case the claim under consideration was not comprised in the nationalization, as alleged by the intervener, so that there was no ground for allowing Banská to be joined in the proceedings.

Banská appealed.

Held (by the Court of Appeal): that the appeal must be dismissed. Even if it should be found that under the Presidential Decree of 1945 and the Executive Decree of the Minister of Industry the nationalization of the Röhren-Walzwerk as a whole included its claims on foreign debtors, that conclusion would not justify the appellant's intervention in proceedings in a Dutch Court, because this particular nationalization must be regarded as contrary to Netherlands *ordre public* on the ground that its basic provisions and their implementation in the form of an expropriation were directly at variance with Article 158 of the Netherlands Constitution. Article 8 of the Decree of 1945 stated that compensation would be paid, but neither the further provisions of the Decree itself nor the executive regulations of the Minister of Industry gave

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Contd.

any guarantee that that compensation would indeed be given, nor did they impose upon the State any obligation to that effect. The expropriation was carried out in a purely administrative way, so that the nationalized company had no say in the matter and had no right to claim compensation in a court. As there was no right to compensation, the nationalization was contrary to Netherlands *ordre public* and the intervenor could derive no rights thereunder against the defendant.

[Reports: *N.J.*, 1951, No. 611; *ibid.*, 1952, No. 554.]

Case
No. 8

Recognition of Acts of Foreign Governments—Nationalization of Business Enterprise—Debts Owing to Enterprise—Expropriation without Compensation.

BÁNSKÁ Ā HUTNÍ SPOLEČNOST *v.* HAHN.

Denmark, Western Provincial Court. May 12, 1952.

THE FACTS.—On July 1, 1939, the firm of Albert Hahn, in Czecho-Slovakia, delivered to a Danish company goods for the sum of 1,878 Swedish kroner. Owing to the unstable international situation the money had not been paid before the outbreak of the Second World War. After the war the firm of Albert Hahn was nationalized and all its assets transferred to a newly-established Czechoslovak State company. The nationalization took place in pursuance of a Presidential Order of October 27, 1945. In the Order it was stated that the nationalization comprised claims belonging to the nationalized firms. In two Orders of December 27, 1945, and March 7, 1946, issued by the Czechoslovak Minister of Industry it was laid down that the firm of Albert Hahn was nationalized as from October 27, 1945, that its property became State property, and that the nationalization comprised, *inter alia*, debts owed to the firm. Thereafter both the State company and the former proprietors of the firm of Albert Hahn claimed payment from the Danish debtor for the goods delivered in 1939. The debtor, being in doubt as to whom he had to pay the sum in question, deposited the sum in a Danish bank. In 1950 an action was brought by the State company against the former owners of the firm of Albert Hahn asking that the defendant should acknowledge the plaintiff's title to the debt in question. The defendant asserted that the nationalization, which was not accompanied by compensation, could not have any legal effect in Denmark. The Czechoslovak Ministry of Industry in a statement of July 10, 1950, confirmed that the defendant's firm had been nationalized and its property transferred to the plaintiff and that the nationalization and the transfer comprised, *inter alia*, the claim on the Danish debtor.

In a decision of May 1, 1951, the lower Court of Randers held that the nationalization must be regarded as incompatible with Danish general principles of law and that it had no legal validity with regard to assets in Denmark.

On appeal,

Held: that the decision of the Court below must be upheld and that the nationalization decree could have no legal force as regards the claim on the Danish company.

[Report: *Ugeskrift for Retsvaesen*, 1952, p. 856.]

**Recognition of Foreign Judgment Contrary to a Treaty—Case
International Limits of Jurisdiction—Divorce—*Res Judicata*. No. 9**

FOREIGN JUDGMENTS (TREATY OF LAUSANNE) CASE.

Greece, Court of Appeal of Nauplie. 1952.

THE FACTS.—This was an appeal from a Court of first instance denying the appellant a divorce on the ground that the subject-matter of the proceedings was *res judicata* because of a judgment of the Civil Chamber of the Tribunal of First Instance at Istanbul, dissolving the appellant's marriage to the respondent. The respondent was a Turkish national, and the appellant, by reason of the marriage, acquired Turkish nationality. It was objected on behalf of the appellant that Article 42 of the Treaty of Lausanne, 1923, provided as follows:

"The Turkish Government undertakes to take, as regards non-Moslem minorities, in so far as concerns their family law or personal status, measures permitting the settlement of these questions in accordance with the customs of those minorities.

These measures will be elaborated by special Commissions composed of representatives of the Turkish Government and of representatives of each of the minorities concerned in equal number. In case of divergence, the Turkish Government and the Council of the League of Nations will appoint in agreement an umpire chosen from amongst European lawyers. . . ."

Held: that the appeal must be dismissed. The Court said:

"Foreign judgments can be executed in Greece in accordance with the provisions of Articles 858-860 of the Code of Civil Procedure. These embody the principle which results from the rules of international law and of the international recognition of foreign judgments, both as regards their enforceability and as regards the principle of *res judicata*, and, in addition, as regards their constitutive effect so far as rights are concerned. The conditions upon which the executory force of a judgment is determined must be applied in a manner analogous to those which apply to determine whether a foreign judgment must be given the force of *res judicata* in Greece.

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When these conditions exist, the foreign judgment has the force of *res judicata* even though it has not been declared executory in accordance with the above-mentioned Articles of the Code of Civil Procedure. . . . On the other hand, it is not necessary that judgments relating to matters of personal status or capacity should be formally made executory, because such judgments produce their legal effects independently of any formal act of any governmental organ.

"It follows from Articles 850-861 of the Code of Civil Procedure that a foreign judgment should emanate from an authority having power to decide disputes between individuals in accordance with the public law of the foreign country concerned; that, whatever its form or nature, it should possess those elements, without which it is non-existent; and that it should be final according to the law of that State whose courts have rendered the judgment. In the case of divorce it should also be irrevocable; and, if it is, then it produces the same effects as a judgment of our own courts. The proof of its irrevocable character can be established from declarations of competent authorities on the point.

"The defence of *res judicata*, on the basis of which the appellant's petition for divorce was rejected, is based on a judgment of the Civil Chamber of the Court of First Instance of Istanbul. The official copy of this judgment having been produced with all the necessary certified signatures, and with a translation in due and proper legal form, it follows that the said judgment possesses all the essential requirements of validity as an act of justice. The affirmation made on the judgment by the Clerk of the Court shows that the judgment is, according to Turkish law and procedure, irrevocable. Furthermore, the certificate which has been produced, and which is signed by the Secretary of the Court, shows that the judgment was notified to the appellant, and this fact has been recognized by her without her availing herself of the right of appeal given to her by the Turkish Code of Civil Procedure. . . .

"In accordance with a principle generally recognized, in order that a foreign judgment should possess the authority of *res judicata* it is essential that the State where the judgment was pronounced had, at the time the judgment was pronounced, an internationally recognized jurisdiction in the matter, even apart from the question whether it possessed jurisdiction in conformity with its own rules of municipal law. . . .

"According to the view generally held it is the rules internationally recognized, and not those of the State where the judgment is pronounced, that are applicable, for the country where it is attempted to enforce the foreign judgment has the right to refuse recognition under conditions in which it would

not assume jurisdiction according to its own law. . . . Consequently, the judgment of this foreign Court must be considered in the light of the conditions in which Greek Courts exercise jurisdiction over Greeks, since the respondent, who raised the objection of *res judicata*, was a Turkish national, and so was his wife.

"The Greek Courts are always competent so far as Greek defendants are concerned, even though a defendant is neither domiciled nor resident in Greece. . . . In accordance with the rules of international procedure applied in Greece, the Turkish courts are competent so far as Turkish nationals are concerned, even though they are neither domiciled nor resident in Turkey, and the judgment of the Court of first instance in a contrary sense must be reversed.

"It appears from the documents produced that the respondent is a Turkish citizen by birth, that he married the appellant, and that their marriage was recorded in the Civil Register. The appellant was Greek by birth, and acquired, by reason of her marriage, and in accordance with Turkish law, Turkish nationality, thereby losing Greek nationality according to Article 25 of the Civil Law of 1856 as modified in 1926. The documents establish the Turkish nationality of the parties, and they continue to possess that nationality at the time of these proceedings. In particular, so far as concerns the appellant, it is true that the loss of Greek nationality, which she formerly possessed, presupposes the acquisition by her, by reason of her marriage, of Turkish nationality under Turkish law, according to which also the validity of her marriage must be determined; but the documents issued by the Turkish authorities are sufficient proof both of her nationality and of the validity of her marriage. Quite apart from the fact that the documents in question prove that Turkish nationality existed after 1923, it is necessary, in order to sustain the appellant's contention that the respondent acquired Greek nationality under Article 7 of the Convention concerning the Exchange of Greek and Turkish Populations annexed to the Treaty of Lausanne,¹ and under the Decree-Law of 1923 concerning the naturalization *en masse* of Greek refugees from Turkey in Greece, to show that the respondent fell into the category of persons who were exchangeable. It appears from the submissions made by the appellant that the respondent

¹ Article 7 of that Convention provides:

"The emigrants will lose the nationality of the country which they are leaving, and will acquire the nationality of the country of their destination, upon their arrival in the territory of the latter country.

"Such emigrants as have already left one or other of the two countries and have not yet acquired their new nationality, shall acquire that nationality on the date of the signature of the present Convention."

was 'established' before October 30, 1918, within the perimeter of the Prefecture of Constantinople, and was consequently excepted from exchange under Article 2 of the Convention and under Articles 10 and 28 of the Ankara Agreement of June 10, 1930, ratified by Law No. 4793 of 1930. . . .

"It has been argued that the Bishop's Courts and the Mixed Council of the Oecumenical Patriarch have competence in so far as Orthodox Christians are concerned, if, although Turkish nationals, they are of Greek origin. This does not render ineffective the jurisdiction of the Courts of the Turkish State. . . . Article 42 of the Treaty of Lausanne, ratified by the Decree-Law of August 25, 1923, provides that 'the Turkish Government undertakes to take, as regards non-Moslem minorities, in so far as concerns their family law or personal status, measures permitting the settlement of these questions in accordance with the customs of those minorities. These measures will be elaborated by special commissions composed of representatives of the Turkish Government and of representatives of each of the minorities concerned in equal number. In case of divergence, the Turkish Government and the Council of the League of Nations will appoint in agreement an umpire chosen from amongst European lawyers.' The measures necessary to give effect to this Article were never taken, and so the question of the competence of the Turkish Courts does not even arise. . . .

"Article 859 of the Code of Civil Procedure declares that a foreign judgment is not executory, and does not acquire the force of *res judicata*, if it is contrary to public order—and this means international, not internal, public order. The judgment is contrary to public order if it has been rendered by default, or by reason of the non-appearance of the party cited; for the rule that 'No man shall be condemned unheard' is a fundamental axiom in the administration of justice, and so a part of public order. A judgment rendered in violation of this rule cannot be recognized. . . .

"In the present case it appears that, after several adjournments, the merits were dealt with on September 10, 1948, when the judgment under consideration was pronounced dissolving the marriage. . . .

"The rules laid down by the Turkish Code of Civil Procedure for service of process on a defendant resident abroad were complied with. In addition, the time necessary for an appeal was granted. . . . Consequently, it cannot be said that this foreign judgment was pronounced under conditions which violate the rule that 'No man shall be condemned unheard'; and it is therefore not contrary to public order in the sense accepted by international law. . . .

“According to the better opinion, in order to possess executory force and to acquire the force of *res judicata*, it is not necessary that the foreign judgment should have applied the rules of private international law in force in the State where execution is sought. Therefore, the fact that the foreign Court has wrongly applied the Turkish Civil Code, instead of the customs of the non-Moslem minorities in Turkey, applicable to the case in virtue of Article 42 of the Treaty of Lausanne, has no bearing on the recognition of the judgment. An international treaty ratified by a law incorporating the text becomes part of internal law, and is applied as such by the Courts. From the terms of the Treaty of Lausanne it results that Turkey, in accordance with the rules of international law (Article 37 of the Treaty) is bound, in conformity with the procedure indicated for the determination of the appropriate measures to be taken, to adapt its legislation to that end in order to carry out the Treaty. However, if the necessary legislation has not been enacted, or if rules are enacted contrary to the stipulations of the Treaty, the local judge, as well as all the local authorities in general, must, under the practice generally in force, apply the provisions of internal law; for, in case of conflict with an international treaty, these provisions must prevail, unless the Constitution of the State expressly gives preference to the treaty over the rules of internal law. . . . The Greek Courts are not, therefore, justified in refusing recognition of a foreign judgment on the ground that it has applied internal law in violation of international law, even though the State in which execution is sought was a party to the Treaty in question. In virtue of the doctrine of *res judicata* this appeal is dismissed.”

[Report: *Revue hellénique de droit international*, 7 (1954), p. 281.]

Acts of Foreign Governments—Recognition of—Nationalization of Property.

See Case No. 92 (*In re Arbulich's Estate*).

V.—Continuity of States

[See also below, E, State Succession.]

Case No. 10 **States—Continuity of—German Reich and German Federal Republic—Sale of Land to German Reich—Failure of Reich to Pay Purchase Price—Whether German Federal Republic Liable to Return Land to Vendors—Whether German Federal Republic Liable to Pay Purchase Price.**

SALE OF LAND (GERMANY) CASE.

German Federal Republic, Court of Appeal of Oldenburg.

April 9, 1952.

THE FACTS.—In 1944 the plaintiffs sold a parcel of land to the German Reich. The purchase price remained unpaid, and the plaintiffs now brought an action against the German Federal Republic, as successor in title of the German Reich, for the return of the land, alternatively for payment of the purchase price. As far as here material, the Federal Republic contended that where one contracting party has performed the contract—as the plaintiffs had done in the present case—while the other has failed to do so, the latter cannot, according to German law, be compelled to return what he has received unless his inability to perform the contract is permanent and not merely temporary; and that as the inability of the Federal Republic to perform the contract was likely to last only until such time as a law would be enacted providing in some form for the liability of the Federal Republic to discharge the debts of the Reich, the Federal Republic was not bound to return the land to the plaintiffs. With regard to the alternative claim for payment of the purchase price, the Federal Republic contended that it was not the successor in title of the Reich so as to be liable to discharge all the debts of the latter, and that the alternative claim must therefore also be dismissed.

Held: (i) that the inability of the Federal Republic of Germany to perform the contract was only temporary, and that accordingly the plaintiffs were not entitled to the return of the land; and (ii) that the Federal Republic of Germany was not the successor in title of the German Reich in so far as concerned liability for the discharge of the latter's debts, and that the alternative claim of the plaintiffs for payment of the purchase price must therefore also be dismissed.

The Court said:

“The plaintiffs are not entitled to claim the return of the land in accordance with section 323 or section 325 of the Civil Code. These provisions presuppose the existence of a permanent impossibility of performance. There is, however, as far as the defendant is concerned, only a temporary impossibility of

performance because Article 134 (4) of the Constitution provides that the settlement of debts incurred by the Reich shall be provided for by legislation. In view of the fact that Article 134 (4) of the Constitution provides for the future enactment of the relevant legislation, the plaintiffs can reasonably be expected, even today, to adhere to the contract, the more so as many other creditors of the former German Reich also have to wait for their claims to be met. . . . As, in accordance with the foregoing, the main claim for the return of the land is ill-founded, the plaintiffs cannot successfully assert their subsidiary claim for payment of the agreed purchase price."

[Report: NJW, 5 (1952), p. 1341.]

**States—Continuity of—Continued Existence of German Reich Case
—Judgment against Reich—Whether Enforceable against No. 11
German Federal Republic.**

STATUS OF GERMAN REICH (CIVIL PROCEEDINGS) CASE.

German Federal Republic, Court of Appeal of Bremen.

June 20, 1952.

Persons who were subject to discriminatory treatment while the National-Socialist régime exercised supreme authority over the territory of the former German Reich, and who, by virtue of a Law enacted after the end of hostilities in the Second World War, are entitled to claim compensation for loss of or damage to property caused by officials of the former Reich in furtherance of the discriminatory policy of the National-Socialist régime, are entitled to institute proceedings against the Reich, notwithstanding that the latter is no longer politically extant as formerly constituted. Where such proceedings are well-founded, the Courts may give judgment against the Reich. A judgment so given, however, is not enforceable against the Federal Republic of Germany.

The Court, in arriving at the conclusions here summarized, said:

"The Court, following a previous decision, has constantly declared the German Reich liable to pay a sum of money expressed in Deutschemark where the claim has been one for monetary damages. In this context this Court has said that even now the German Reich could be sued as a defendant in respect of liabilities arising out of the Restitution Law. In so doing, the Court has followed the Supreme Court of the Federal Republic which has held that the German Reich must be treated as continuing to exist, even after the enactment of the Constitution of the Federal Republic, in so far as concerns existing liabilities which have not been transferred to another legal entity or cancelled. . . . From the point of view of the con-

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tinued existence of the German Reich, Article 134 of the Constitution [of the Federal Republic] would not constitute an obstacle to a judgment for payment of money being given against the Reich.¹ We cannot infer from this provision that the federal law to be enacted in the future is intended primarily to provide for the fate of the liabilities of the German Reich as such, and not for the liability of the Federal Republic for the debts of the Reich. On the assumption that the German Reich continues to exist, only the German Reich itself, and not the legislature of the Federal Republic, would be able to make provision for the fate of the liabilities of the Reich, because the legislature of the Federal Republic cannot encroach upon the legal affairs of an entity alien to itself and deemed to be still in existence, to wit the German Reich. The legislature of the Federal Republic can make provision only for the consequences following upon a taking over of the property of the Reich, *viz.*, for its own liability for the debt of another. Accordingly, Article 134 of the Constitution can only concern the liability of the Federal Republic for debts of the Reich. . . . The Court therefore comes to the conclusion that it is permissible to give a judgment against the German Reich for the payment of a sum of money expressed in Deutschemark. We must lay stress upon the fact, however, that this decision is based on the assumption that the German Reich is not identical with the Federal Republic. It would therefore be advisable to state expressly in the operative part of the order of the Court that the judgment for payment of a sum of money has no direct effect as against the Federal Republic."

[Report: RzW, 3 (1952), p. 231.]

**Case
No. 12**

States—Continuity of—Whether German Federal Republic Successor of German Reich—Recourse against Private Property Confiscated by Reich—Property Situate in Territory of Federal Republic at Time of Action—Who is Person Liable to be Sued—The Law of Germany.

RECOURSE AGAINST REICH (PROCEDURE) CASE.

German Federal Republic, Federal Supreme Court.

December 12, 1952.

THE FACTS.—In 1942 the plaintiffs purchased a business from one E. E. himself had purchased the business from a person whom the German discriminatory legislation of the National-Socialist régime defined as a Jew. In 1950, on the

¹ Paragraph 1 of Article 134 of the Constitution provides that "the property of the Reich becomes, in principle, the property of the Federation" (Federal Republic); paragraph 4 provides that "further details shall form the subject-matter of a federal law requiring the consent of the *Bundesrat*."

basis of legislation enacted after the war to enable Jews to recover their property from persons to whom it had been sold as a result of the discriminatory legislation of the National-Socialist régime, the Jewish vendor recovered a sum of money from the plaintiffs in settlement of his claim for the return of his property. The plaintiffs, by virtue of the relevant legislation enacted in Germany, had a right of recourse against E. It appeared that E.'s property had been confiscated by the Reich during the war, and it further appeared that the property so confiscated was in the territory of the Federal Republic of Germany. The question therefore arose whether the plaintiffs were entitled to bring their action against the head of the Treasury Department (*Oberfinanzpräsident*) of the Federal Republic situate within the district where E.'s property was.

Held: that, irrespective of whether the German Federal Republic was regarded as a truncated portion of the former Reich but in law identical with the latter, or whether the Reich continued in existence without legal capacity to act, or whether (although the Reich continued to exist without such capacity) the Federal Republic was responsible only for those liabilities of the Reich which it had assumed by express legislation, the head of the Treasury Department of the district in which E.'s property was situate was the person against whom the action had to be brought. In order to arrive at this conclusion it was not necessary to determine the legal status of the Reich or the question whether the Federal Republic of Germany was liable to the plaintiffs in the present case. The Court said:

“ The substantive legal position may vary according to the view that is taken of the legal relationship between the German Reich and the Federal Republic. If it is assumed that the Federal Republic was from its inception only a constitutionally re-formed Reich temporarily restricted in its territorial sovereignty, and that the Reich itself continued to exist from 1945 until the establishment of the Federal Republic, albeit as an entity lacking capacity to act, and that the Reich has now again been provided with organs capable of acting on its behalf, then the action is in reality an action against the Federal Republic, in which case the latter may well be responsible, without specific legislation to that effect, for such liabilities of the Reich as are here in issue, *viz.* arising out of legal measures taken by organs of the Reich in the territory of the Federal Republic. If it is assumed that the Federal Republic is not the Reich but that the latter continues to exist without capacity to act, then the question arises whether

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the transfer of all the assets of the Reich situate in the territory of the Federal Republic, which, in principle, is brought about by the Constitution of the Federal Republic, has the effect of making the Federal Republic responsible for all the liabilities attaching to such assets, by virtue of general principles of law and independently of any express legal enactment. If this question is answered in the affirmative, then the action would likewise be directed against the Federal Republic. Finally, if it is assumed that the Reich continues to exist without capacity to act and that the Federal Republic, notwithstanding that it may have taken over all the assets of the Reich, is responsible only for those liabilities of the Reich which it has taken over by express legislative enactment, and that the liability with which this action is concerned is one of these liabilities, then the action is in reality an action against the Reich, and there would only remain the question whether the liability of the organs of the Federal Republic to be cited as defendants in this action can be derived from the fact that the Federal Republic has taken over all the assets of the Reich as its own property and for the purpose of administering the same. These substantive questions need not be finally determined at this stage of the proceedings because, on all the three assumptions here referred to, those organs of the Federal Republic which administer the assets of the former Reich represent the Federal Republic or the Reich in legal disputes alleging the existence of liabilities of the Reich or the Federal Republic which are connected with the assets of the Reich now vested in the Federal Republic. . . .

“ While formerly the fiscal representation of the Reich was governed by laws or administrative instructions, there are no such rules in the Federal Republic at the present time. Thus, we cannot find any special rules governing the representation of the Federal Republic or the Reich in fiscal litigation. This fact does not, however, justify the conclusion that for the present claims against the fiscal authorities of the Federal Republic or the Reich cannot be asserted by way of litigation. This would result in a refusal, at present unlimited in time, to make available legal channels for the assertion of such claims. . . . There is therefore a presumption that in actions against the general assets of the Reich now vested in the Federal Republic, the person to represent the Treasury of the Federal Republic as well as the Reich is the head of the Treasury Department who is competent *ratione loci*.

“ The proceedings in this case were therefore rightly and validly served on the *Oberfinanzpräsident* of Stuttgart.”

[Report: BGHZ, 8 (1953), p. 197.]

States—Continuity of—Identity of New Government of Case
Territory of Former State—German Federal Republic as No. 13
Continuation of Former German State.

GEVATO *v.* DEUTSCHE BANK.

Holland, District Court of Rotterdam. January 18, 1952.

THE FACTS.—This was an application by Gevato, a Dutch company, defendants in an action brought by the Deutsche Bank, for an order that the Bank, being a foreign company, should, before continuing with the action, deposit 1,000 guilders as *cautio judicatum solvi*. The Bank did not oppose the application, but was only willing to deposit 500 guilders. The Court, however, examined *mero motu* whether the Hague Convention on Civil Procedure of 1905 was still in force between Holland and Germany, or, having been suspended as between them during the war of 1940–1945, was again in force, and whether, as a consequence, the *cautio* could be ordered or not.

Held: that the application for the *cautio* must be dismissed. The Convention of 1905 must be regarded as still in force. The Court said: "The Convention of 1905 was in force between the Netherlands and the then existing German Reich on May 10, 1940. The state of war which broke out on that date between the two States did not, as between them, bring the said Convention definitively to an end. The then German Reich had in 1945 ceased to exist. Subsequently, the new West German Federal Republic was organized on part of the territory of the former German Reich. This Republic includes most of the subjects of the former Reich. Since April 4, 1951, the Netherlands have been represented in the Republic by an Ambassador, and on June 28, 1951, a German Ambassador presented his credentials to Her Majesty the Queen, so that diplomatic intercourse has been restored between the Netherlands and the West German Federal Republic. By a Royal Decree of July 23, 1951, the Netherlands Government declared that they regarded the state of war which had existed between the Netherlands and the German Reich since May 10, 1940, as terminated. This course of events, and in particular the disappearance of the German Reich in 1945, did not put an end to the existence of the German State. The authority of the German State had at first, for lack of a German Government representing that State, been collectively exercised by the four Occupying Powers, three of whom, occupying the territory of the German Federal Republic organized with their consent, had transferred to that newly created Republic an ever-increasing part of the sovereign authority which had hitherto been exercised by themselves within the frontiers of that

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territory. This West German Federal Republic was not a new State; it was the continuation of the German State which existed previously and which had never ceased to be. The continuation of the German State in the form of the West German Federal Republic was governed by the generally accepted principle of public international law, *forma regiminis mutata non mutatur civitas ipsa*. When a new Government makes its appearance on the territory of an already existing State, it does not mean that international rights previously acquired by that State are lost, and that the international obligations previously undertaken by it come to an end. On the contrary, those rights and obligations continue to be vested in, and to bind, the State in its new constitutional form. It follows therefore that the Convention of 1905 did not cease to bind the German State when in 1945 that State ceased to exist as an international person."

Since, therefore, the outbreak of war between Holland and Germany did not put an end, as between them, to the Convention of 1905, and the Convention not having since then been denounced as provided in Article 29 thereof, either by the Netherlands or by any sovereign authority which arose in Germany after May 10, 1940, that Convention was in full force between the Netherlands and the West German Federal Republic seeing that a state of war no longer existed between the two countries and that they maintained diplomatic relations again, one with the other, according to the general rules of international law. It did not make any difference for the present purpose that, as appeared from a communication in the *Jaarboek van het Ministerie van Buitenlandse Zaken voor 1950-1951* (*Yearbook of the Ministry of Foreign Affairs, 1950-1951*), the Netherlands Government was complying with a request from the Powers occupying Germany to examine the treaties in force between the Netherlands and Germany on May 10, 1940, and to state which of them it wished should again apply between the parties; that two lists of such treaties had already been submitted to the Powers; and that a third was in preparation. Even if the Netherlands Government were to desire that one or more of the provisions of the Convention on Civil Procedure of 1905, or the Convention as a whole, should no longer apply or that it should henceforward apply only in a modified form, yet until the Convention was either formally abrogated as between the two States or replaced or modified by a new Convention, that Convention of 1905 must be regarded as being in force between Holland and Germany.

[Report: N.J., 1952, No. 327.]

NOTE.—For a decision in which a similar judicial view was taken of the military and political events in Germany from the unconditional surrender of 1945 onwards, see the judgment of the Special Court of Cassation in *In re Flesche* (*Annual Digest*, 1949, Case No. 87).

**States—Continuity of—Position of Germany after 1945—
Treaty Obligations—Agencies Competent to Determine the
Question of Extinction of Treaties.** **Case
No. 14**

LANDIS & GYR A.G. v. W. H. GOENS & CO.

Switzerland, Justizkommission of the Canton of Zug.

November 12, 1951.

Federal Tribunal. June 4, 1952.

THE FACTS.—The respondent, a German company, in May 1951 instituted a civil action in the Court of first instance of Zug, against the present appellant. The appellant company asked for Fr.10,000 to be paid into Court as security for costs. In support of this demand it contended that Article 17 of the Hague Convention on Civil Procedure, 1905, which provides for the exemption from *cautio judicatum solvi* of nationals of the Contracting Parties, was inapplicable for the following reasons: first, the German Reich, which was a party to the Convention, had been replaced by two States, neither of which was its successor; secondly, the obligations concerning the payment of costs imposed on member States by the Convention could not be carried out by the Federal Republic in view of the exchange control legislation enacted by the States occupying it at the time. The Court of first instance asked the Federal Department of Justice and Police for guidance. It was advised that the Hague Convention on Civil Procedure was in force between Switzerland and the Federal Republic of Germany since the latter was a part of a contracting State. The Court of first instance accordingly rejected the demand for *cautio judicatum solvi*. Landis & Gyr A.G. thereupon appealed to the *Justizkommission* of Zug.

Held: that the appeal must be rejected. The Court said:

“The first question is whether the Hague Convention on Civil Procedure is valid in relation to Germany, which is now divided into the ‘Federal Republic’ and the ‘German Democratic Republic’. The decision whether a treaty is still in force cannot be made by the judge but only by the Federal Council, which, according to Article 102 (8) of the Constitution of the Confederation, is responsible for its international relations. The question is thus settled by the advice given by the Federal Department of Justice and Police. It further becomes

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unnecessary to consider the question whether the German Reich has ceased to exist as a unitary State. It suffices, in this connection, to refer to a decision of the Federal Tribunal (BGE, 49, I, 188) which cites the recognized principle of international law that changes in the form of government and internal organization of a State have no effect on its international rights and obligations, and, in particular, do not bring to an end the rights and obligations arising from treaties concluded by it.

"It cannot be maintained that the Convention is inapplicable because a Swiss judgment as to costs cannot be enforced in Germany under the present exchange control legislation. While international law admits the possibility of denouncing a treaty owing to a material change of circumstances, one cannot speak of a termination *ipso jure*, without the other contracting party being informed of an intention to terminate, in the forms prescribed by international law (*cf.* BGE, 49, I, 196). Notice of denunciation can only be given by the organ which had previously brought the treaty into force by ratification. The same is true in the case of non-performance on the ground of retorsion. This also can only be brought about by the authority responsible for the international relations of Switzerland. The appropriate federal authority has neither denounced the Convention, nor has it ordered measures of retorsion. Accordingly, the provisions of the Convention must be applied in respect of German nationals."

On further appeal,

Held (by the Federal Tribunal): that the appeal must be dismissed. The German State continued to exist and its international obligations subsisted. The Court said:

"The answer to the question whether the respondent is exempt from the payment of security for costs depends on the continued validity of the Hague Convention on Civil Procedure in relation to Germany. The *Justizkommission* took the view that this was a question for the Federal Council to decide. This view, which is based on the decision of the Federal Tribunal in BGE, 49, I, 194, constitutes too narrow an interpretation of that decision. Admittedly, only the political authorities can denounce the Convention or can decree, as a reprisal [retorsionary measure] for its violation by another State, that it shall not be applied in relation to that State for the time being. Where, however, the question whether a foreign State is party to the Convention arises in connection with a demand for security for costs, the Court must preliminarily determine that question. Thus the Federal Tribunal assumed in BGE, 49, I, 194, that Russia had not ceased to exist as a State, despite

a change in its form of Government and fundamental modification of its legal system, and that accordingly it remained a party to the Convention. In its unpublished decision of October 26, 1942, in the case of *Peutmann*, it found that the Kingdom of Croatia, which separated itself from Yugoslavia during the Second World War, was not the legal successor of Yugoslavia, and thus was not a party to the Convention. In the unpublished decision of July 10, 1947, in the case of *Rümbeli*, it held that the State of Austria, again independent after the end of the war, must be considered to be a party to the Convention.

"The question whether the Convention is applicable with regard to the Federal Republic of Germany would have to be answered in the negative if Germany, as it existed prior to 1945, had ceased to exist and two new independent States had been formed on its territory. International obligations such as those in question here come to an end with the extinction of a State and do not pass to the State which succeeds to its territory. . . .

"As most writers on international law assume, Germany did not cease to exist as a State after the defeat of 1945, but merely lost its international capacity . . . The treaties concluded by Germany therefore did not come to an end on defeat. The Federal Council had already found, in its decision of May 8, 1945, concerning the non-recognition of an official German Government, that Swiss-German agreements subsisted. It expressly confirmed this in a decision of October 24, 1947, concerning the Swiss-German Double Taxation Agreement of July 15, 1931. Similarly, Swiss Courts have regarded Germany as a party to the Hague Convention on Civil Procedure (decision of the *Obergericht* of Zurich, December 1, 1945: SJZ, 1946, p. 89; unpublished decision of the Federal Tribunal, April 15, 1946, in the '*Helvetia*' case [*Annual Digest*, 1946, Case No. 85]).

"The establishment of the West German 'Federal Republic of Germany' has not altered the circumstances which are determining for the continued validity of treaties. Its Constitution, the *Grundgesetz* of May 23, 1949, is, according to its own terms, only a transitional measure and is not intended to create a new West-German State, but rather to reorganize the existing German State to the extent permitted by the occupying States. Accordingly, it is to be assumed that earlier treaties concluded with Germany continue to be in force in relation to the Federal Republic (Bindschedler in *Annuaire Suisse de Droit international*, 1949, at p. 60, refers to Article 123, paragraph 2, of the Constitution, which merely makes a reservation with regard to treaties concerning matters

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within the competence of the *Länder*; it is to be deduced therefrom that treaties falling within the competence of the authorities of the former Reich continue to be in force). The Federal Tribunal has already assumed that the Swiss-German Extradition Treaty of June 24, 1874, continues to be in force (unpublished decision of September 27, 1950, in the case of *Wolfbaum*). There is no reason why another principle should be applied in the case of other treaties, such as the Hague Convention on Civil Procedure. No conclusion to the effect that treaties concluded with Germany before 1945 are no longer valid can be drawn from the attitude of the Swiss or German political authorities. In negotiations between Switzerland and the Federal Republic the question whether 'Germany' or, in the place of the Third Reich the 'Federal Republic of Germany', was a party to the Paris Convention on the Protection of Industrial Property was left open, and it was merely noted that this Treaty was again fully enforceable in the territory of the Federal Republic; but this in no way militates against the continued validity of treaties concluded with Germany. Moreover, by exchange of correspondence between the heads of the two delegations, dated November 2, 1950, it was determined that the Convention of 1892-1902 concerning the mutual protection of patents and trademarks continued to be in force between the two countries. Finally, the declarations made by the West-German Government regarding the Conventions concerning the protection of industrial property do not constitute new acts of accession, but are an indication to the other parties that it is again possible to apply these Conventions fully in the territory of the Federal Republic. It is not established that German Courts have taken the view that the Hague Convention on Civil Procedure was no longer in force for the Federal Republic; in the judgment of April 24, 1951, which has been cited by the defendant, the *Landgericht* of Stuttgart took the view that the Convention was, in itself, applicable, but that Article 18 thereof could only be applied within the limits established by the exchange control legislation enacted by the Occupying Powers.

"The Federal Tribunal has on various occasions decided—and set out its reasons for such a view—that despite such limitations or other incomplete performance of its obligations by a State, Article 17 of the Hague Convention must be applied by the Swiss Courts as long as the competent political authorities have not denounced the Convention or ordered measures of retorsion with regard to that State (BGE, 49, I, 198; BGE, 77, I, 50)."

[Report: *A.T.F.*, 78 (1952), I, p. 124.]

B.—COMPOSITE AND DEPENDENT STATES AND TERRITORIES

I.—Unions of States

i.—Federal States and Confederations

Federal States—Ruler of State in Pakistan Federation—Sovereignty Limited by Instruments of Accession—Whether Ruler Entitled to Immunity.

See Case No. 45 (*Sayce v. Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State*).

II.—British Commonwealth of Nations

British Commonwealth of Nations—Sovereignty and Independence of the Dominions—Position of Dominion Legislatures Prior to Passing of the Statute of Westminster—Effects of Statute of Westminster—Whether South Africa Became a Sovereign Independent State—Whether the Statute Established Legislative Supremacy of South African Parliament—Whether Courts of the Union Deprived of Power to Review Validity of Acts of Parliament in the Light of the Constitution.

**Case
No. 15**

HARRIS AND OTHERS *v.* MINISTER OF THE INTERIOR AND ANOTHER.

Union of South Africa, Supreme Court, Appellate Division.
(Centlivres C.J.; Greenberg, Schreiner, van den Heever and Hoexter JJ.A.)
March 20, 1952.

THE FACTS.—In 1951 a Bill entitled the Separate Representation of Voters Act, Act 46 of 1951, was introduced into the South African Parliament. It was passed by simple majorities, first in the House of Assembly, and then in the Senate. It later received the Royal Assent, as signified by the Governor-General, and it was promulgated in the usual way. The normal procedure by which a Bill became law was thus completed. The Statute provided for the separate representation of European and non-European voters in the Province of the Cape of Good Hope. For the purposes of the Act a European was defined as “a person who in appearance obviously is, or who is generally accepted as a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a non-European.” The

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effect of the Statute was that a non-European who, immediately prior to the passing of the Act, was entitled to vote in the same constituency as a white person, was thereby debarred from doing so. In future he would have to vote in the separate non-European constituency in which he was registered, with other non-white voters.

The validity of the Act was contested by certain non-European voters, on the ground that it was *ultra vires* the Constitution of the Union. Section 35 of the South Africa Act, as amended by section 44 of Act 12 of 1936, provided:

“ 35. (1) Parliament may by law prescribe the qualifications which shall be necessary to entitle persons to vote at the election of Members of the House of Assembly, but no such law shall disqualify any person (other than a Native, as defined in section 1 of the Representation of Natives Act, 1936) in the Province of the Cape of Good Hope who, under the laws existing in the Colony of the Cape of Good Hope at the establishment of the Union, is or may become capable of being registered as a voter from being so registered in the Province of the Cape of Good Hope by reason of his race or colour only or disqualify any Native, as so defined, who under the said Act would be or might become capable of being registered in the Cape Native voters' roll instituted under that Act from being so registered, or alter the number of the members of the House of Assembly who in terms of the said Act may be elected by the persons registered in the said roll, unless the Bill embodying such disqualification or alteration be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament.

“(2) No person (other than a Native as so defined) who at the passing of any such law is registered as a voter in any province shall be removed from the register by reason only of any disqualification based on race or colour.”

Section 152 of the South Africa Act read:

“ 152. Parliament may repeal or alter any of the provisions of this Act: Provided that no provision thereof, for the operation of which a definite time is prescribed, shall during such period be repealed or altered: And provided further that no repeal or alteration of the provisions contained in this section, or in sections 33 and 34 (until the number of members of the House of Assembly has reached the limit therein prescribed, or until a period of ten years has elapsed after the establishment of the Union, whichever is the longer period), or in sections 35 and 137, shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together, and at the third reading be agreed to by not less than two-thirds

of the total number of members of both Houses. A Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses of Parliament."

The South Africa Act, by which the Union of South Africa was created, had been passed by the Parliament of the United Kingdom at a time prior to the enactment of the Statute of Westminster, which was to free the Dominions from the legislative supremacy of the British Legislature.

Harris claimed that the Separate Representation of Voters Act fell within section 35 of the South Africa Act; and that, as it was not passed by a two-thirds majority of both Houses sitting together as therein provided, it was "null, void and of no effect".

Counsel for the Minister of the Interior argued that, since the passing of the Statute of Westminster, the South African Parliament had become the sovereign legislative body within a sovereign independent State, and that no Court of law could declare an Act of the Union Parliament invalid. The position was thus analogous to that in the United Kingdom, where the doctrine of the sovereignty of Parliament was enshrined in the Common Law. Prior to the passing of the Statute of Westminster, counsel admitted, the Courts could have declared legislation unconstitutional, as contrary to section 35 of the South Africa Act (see *Rex v. Ndobe* ((1930) A.D. at p. 497)); for the South Africa Act was an Act of the British Parliament, and, under the Colonial Laws Validity Act, any legislation repugnant to British statute law was void and of no legal effect. As far as South Africa was concerned, however, the Colonial Laws Validity Act had been repealed by the Statute of Westminster. The South African Parliament could, therefore, legislate in a manner repugnant to any British statute law, including the South Africa Act. If this view were not adopted, South Africa could not be considered a sovereign independent State.

At first instance it had been held by the Cape Provincial Division of the Supreme Court that no Court could question the validity of a statute passed by the South African Parliament. On this question the Court below felt itself bound by the decision of the Appellate Division in *Ndlwana v. Hofmeyr, N.O.* ((1937) A.D. 229), in which it had been decided that, "inasmuch as the Union Parliament is now, since the passing of the Statute of Westminster, the supreme and sovereign law-making body in the Union, the Supreme Court has no power to pronounce upon the validity of an Act of Parliament duly promulgated and printed and published by proper authority". On appeal,

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Held (unanimously, by the Appellate Division of the Supreme Court): that the Separate Representation of Voters Act was *ultra vires* the Constitution of the Union of South Africa. The Appellate Division was not bound by its previous decisions. *Ndlwana v. Hofmeyr* was overruled. South Africa had been a sovereign independent State since the passing of the Statute of Westminster; but this did not mean that the Union Parliament could ignore the provisions of the Act by which it was created. As in the United States of America, the Courts (of South Africa) had power to review legislation in the light of the Constitution.

I. *The Legislative Powers of a Dominion Parliament Prior to the Passing of the Statute of Westminster. The Effect of the Statute on the Constitution and Legislation of the Union of South Africa.*—The Court said (*per* Centlivres C.J.):

“The next question is whether the Statute of Westminster has had the effect of repealing or modifying the provisions of sections 35 and 152 of the South Africa Act.

“The events which led up to the passing of the Statute of Westminster were freely referred to by counsel on both sides. The preamble of the Statute refers to the Imperial Conference[s] held at Westminster in 1926 and 1930 and to the fact that the delegates from the various Dominions ‘did concur in making the declarations and resolutions set forth in the reports of the said Conferences’. The Command Papers Nos. 3717 and 3718 dealing with the proceedings of the Imperial Conference of 1930 were handed in from the Bar, as well as Command Paper No. 3479 on the Report of the Conference on the operation of Dominion Legislation and Merchant Shipping Legislation, 1929—a report which is referred to in Command Paper 3717. In order to understand the reasons for passing a constitutional Act like the Statute of Westminster it is permissible to refer to the events which led up to such an Act being passed. These events may throw a light on the meaning of the Statute of Westminster. See Maxwell on *Statutes*, 8th ed., pp. 20–23; *In re the Regulation and Control of Aeronautics in Canada*¹ ((1932) A.C. 54 at p. 70); and *British Coal Corporation and Others v. The King*² ((1935) A.C. 500, at p. 520).

“The report of the Imperial Conference of 1926 declared (according to the Command Paper No. 3479 of 1930), in relation to the United Kingdom and the Dominions that: ‘they are autonomous communities within the British Empire, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British

¹ See *Annual Digest*, 1931–1932, Case No. 19.

² See *Annual Digest*, 1935–1937, Case No. 21.

Commonwealth of Nations'. The report recognized, however, that existing administrative, legislative and judicial forms were admittedly not wholly in accord with the position as described above, a condition of things following inevitably from the fact that most of these forms dated back to a time well antecedent to the then stage of constitutional development. In 1929 a conference on the operation of Dominion Legislation and Merchant Shipping Legislation was held in London and attended by representatives of the Imperial Government and the Dominions. This Conference drafted a Bill which subsequently became the Statute of Westminster. According to the report of that Conference certain safeguarding provisions were inserted in the Bill at the request of Canada, Australia and New Zealand in relation to their own constitutions. After setting forth the reasons for these provisions the report goes on to state in paragraph 67: 'Similar considerations do not arise in connection with the constitutions of the Union of South Africa and the Irish Free State. The constitutions of both countries are framed on the unitary principle. Both include complete legal powers of constitutional amendment. In the case of the Union of South Africa the exercise of these powers is conditioned by the provisions of section 152 of the South Africa Act, 1909. In the case of the Irish Free State they are exercised in accordance with the obligations undertaken by the Articles of Agreement for a Treaty signed at London on the 6th day of December, 1921.'

"The draft Bill was considered by the Imperial Conference of 1930 and that Conference recommended that Resolutions passed by both Houses of the Dominion Parliaments should be forwarded to the United Kingdom with a view to the enactment of legislation on the lines of the draft Bill and that the Bill should contain such further provisions as to its application to any particular Dominion as should be requested by that Dominion.

"In conformity with the above recommendation the following resolution was passed by both Houses of the Parliament of the Union: 'That on the understanding that the proposed legislation will in no way derogate from the entrenched provisions of the South Africa Act, Parliament, having taken cognizance of the draft clauses and recitals which it was proposed by the Imperial Conference of 1930 should be embodied in legislation to be introduced in the Parliament at Westminster, approves thereof and authorizes the Government to take such steps as may be necessary with a view to the enactment by the Parliament of the United Kingdom of legislation on the lines set out in the Schedule annexed.'

"After the above resolution was passed by the Union

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Houses of Parliament the Statute of Westminster was enacted. The main provisions of that Statute, which came into operation on December 11, 1931, are as follows:

' 2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

' (2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of the Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

' 3. It is hereby declared and enacted that the Parliament of a Dominion has full powers to make laws having extra-territorial operation.

' 4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.'

The relevant provisions of the Colonial Laws Validity Act, 1865, were as follows:

' 2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

' 3. No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.

' 5. . . . every representative (colonial) legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all time to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in Council, or colonial law for the time being in force in the said colony.'

"The ground has now been cleared for considering what effect, if any, the Statute of Westminster had upon the provisions of sections 35 and 152 of the South Africa Act. At the

outset it is necessary to point out that the Statute of Westminster contains no express repeal of those sections. The most that could possibly be contended for is that that Statute impliedly repeals those sections. As to the circumstances in which a provision of a statute may be said to have been impliedly repealed I cannot do better than quote what Kotze, A.J.A., said in *New Modderfontein Gold Mining Co. v. Transvaal Provincial Administration* (1919) A.D. 367, at p. 400. He said: 'The books tell us that a repeal by implication of an earlier statute by a later one is neither presumed nor favoured. It is only when the language used in the subsequent measure is so manifestly inconsistent with that employed in the former legislation that there is a repugnance and a contradiction, so that the one conflicts with the other, that we are justified in coming to the conclusion that the earlier Act has been repealed by the later one. There are many cases dealing with the principles applicable in the matter of implied repeal. I will refer to one or two of them. Lord Blackburn in the House of Lords in dealing with this question made the following apt observations (*The River Wear Commissioners v. Adamson and Others* ((1877) 2 A.C. 743, at p. 763)): "In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of the language, it is impossible to know what the intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view, for the meaning of the words varies according to the circumstances with respect to which they were used."'

"Lord Blackburn on p. 764 in the case of *River Wear Commissioners v. Adamson and Others* referred with approval, to the *Heydon Case* (3 Co. Rep. 7b)—a case which has been followed by this Court. . . . In *Heydon's case*, *supra*, Lord Coke said that it was resolved: 'That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law) four things are to be discerned and considered; 1st. What was the Common Law before the Act? 2nd. What was the mischief and effect for which the Common Law did not provide? 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth? And 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy.' Prior to the Statute of Westminster the 'mischief', as is clearly shown by the Reports of the Imperial Conferences of 1926 and 1930, was that the Dominions were not in the eye of the law 'autonomous communities

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within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs'. In law the Parliament of the United Kingdom was still supreme. The suppression of the 'mischief' of the supremacy of that Parliament was the prime object of the Statute of Westminster; another 'mischief' was that it was not considered that a Dominion Parliament had any power to make laws having extra-territorial operation. Both these 'mischiefs' were removed by the Statute of Westminster. The fact that these 'mischiefs' were removed does not result, as I shall show, in any modification of sections 35 and 152 of the South Africa Act. . . .

"I am now in a position to ascertain what effect, if any, the Colonial Laws Validity Act had in respect of the South Africa Act prior to the Statute of Westminster. A repeal or alteration of the South Africa Act enacted by an Act of the Union Parliament in accordance with the provisions of section 152 would be repugnant to the provisions so repealed or altered. Those provisions are, it is true, contained in a British Act of Parliament, *viz.*, the South Africa Act, but that repugnancy is specifically authorised by that very British Act which is a later Act than the Colonial Laws Validity Act and must therefore in case of conflict override the earlier Act. Section 2 of the Colonial Laws Validity Act could therefore have no application to a repeal or amendment of the South Africa Act.

"Section 2 of the Colonial Laws Validity Act did, however, apply to the Union in other respects before the passing of the Statute of Westminster. Its effect was that the Union Parliament could not pass any law repugnant to a British Act which extended to the Union, *e.g.*, the Merchant Shipping Act. The only part of section 5 of the Colonial Laws Validity Act which was of any importance as far as the Union was concerned was the power given to the Union Parliament to bind a subsequent Union Parliament to follow a prescribed procedure in amending specific provisions of the Union Constitution. See *Attorney-General for New South Wales and Others v. Trethowan and Others* ([1932] A.C. 526). That power was never, however, exercised by the Union Parliament before the Statute of Westminster, as far as I am aware. The rest of section 5 of the Colonial Laws Validity Act was unnecessary as far as the Union was concerned, as the South Africa Act makes full provision for the matters mentioned in that section.

"I now return to the Statute of Westminster. The effect of sub-section (1) of section 2 is that the Colonial Laws Validity Act no longer applies to any law made after December 11, 1931, by the Union Parliament. Consequently the Union Parliament can now make a law repugnant to a British Act of

Parliament in so far as that Act extends to the Union. What I have said is emphasized by the opening words of sub-section (2). A law of the Union Parliament may be made by Parliament sitting bicamerally or, where there is a conflict between the two Houses, unicamerally in terms of section 63 of the South Africa Act. So far as I have now considered the Statute of Westminster, it is clear that when it refers to a law made by a Dominion, such law means in relation to South Africa a law made by the Union Parliament functioning either bicamerally or unicamerally in accordance with the requirements of the South Africa Act. The reference clearly was not only to Parliament sitting bicamerally, for it would be absurd to suggest that a law made by Parliament in terms of section 63 of the South Africa Act would still be subject to the provisions of the Colonial Laws Validity Act.

"The provision that no law of a Dominion Parliament shall be void on the ground that it is repugnant to the law of England was inserted *ex abundanti cautela* because it was feared that with the disappearance of section 3 of the Colonial Laws Validity Act it might be held that laws of a Dominion would be void if repugnant to the common law of England.

"Mr. Beyers (for the respondent) contended that that portion of sub-section (2) of section 2 of the Statute of Westminster which says in effect no law made after December 11, 1931, by the Parliament of the Union shall be void or inoperative on the ground that it is repugnant to the provisions of any existing Act of Parliament of the United Kingdom had the effect of conferring on the Union Parliament the power to amend any section of the South Africa Act (including the entrenched clauses) in accordance with any procedure it might choose to adopt. The South Africa Act, he contended, was an 'existing Act of Parliament' within the meaning of that expression as used in section 2 (2) of the Statute of Westminster. Elaborating his contention, counsel in answer to the Court argued that this provision of the Statute of Westminster gave the Union Parliament the option of acting bicamerally or unicamerally, whether the subject-matter of the legislation falls within or without the entrenched provisions of the South Africa Act.

"I have difficulties in connection with Mr. Beyers' contention. That portion of sub-section (2) of section 2 of the Statute of Westminster to which I have referred confers, by necessary implication, a power on the Union Parliament which it did not possess prior to the passing of the Statute, *viz.*, the power to pass a law which will be a valid law although it is repugnant to an existing or future enactment of the United Kingdom. The object was, in other words, to give the Union Parliament a power which it did not possess prior to the

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Statute of Westminster. But prior to that Statute the Union Parliament had full powers to amend the South Africa Act. It is true that the Union Parliament sitting bicamerally did not have full power to do so in that the entrenched clauses could be amended only by Parliament sitting unicamerally and by a two-thirds majority. But there is nothing in that part of sub-section (2) of section 2 of the Statute of Westminster which I am now considering to justify the inference that there was any intention to repeal or modify the provisions of section 152 of the South Africa Act. There is nothing to prevent the two provisions standing together. The words 'Parliament of a Dominion' in the Statute of Westminster must, in my opinion, be read, in relation to the Union, in the light of the South Africa Act. It is implicit in that Act that the Parliament of the Union must function bicamerally, save in the cases excepted by sections 35, 63 and 152. There is, of course, another element in Parliament, *viz.*, the King (*vide* section 19 of the South Africa Act), but when I speak of Parliament functioning bicamerally I mean that the two Houses sit separately. In my opinion one is doing no violence to language when one regards the word 'Parliament' as meaning Parliament sitting either bicamerally or unicamerally in accordance with the requirements of the South Africa Act. . . . There is, in my opinion, no justification for reading the words 'Parliament of a Dominion' in the Statute as meaning, in relation to the Union, Parliament functioning only bicamerally. When this was put to Mr. Beyers during the course of the argument he saw the difficulty of so reading those words and contended that the Statute of Westminster gives the Union Parliament the option of sitting either bicamerally or unicamerally, whether the subject-matter of the legislation falls within the entrenched clauses of the South Africa Act or not. If this contention were sound, it would follow that the Statute of Westminster has, by mere implication, effected a radical alteration of our Constitution. It would mean that not only could Parliament ignore the constitutional safeguards solemnly enacted in the South Africa Act, but that it could also ignore the provisions of section 63, which provides for a joint sitting of the two Houses where there is a disagreement between the two Houses. Except in the case of Bills dealing with the appropriation of monies for the public service, such a joint session cannot be convened during the first session in which the Senate rejects the Bill, but if Mr. Beyers' contention were correct, Parliament could take a short cut by means of a joint session convened for that purpose, without the Senate ever being asked to consider the Bill. There is, in my opinion, no substance in this contention."

II. *The Position of the Dominions After the Passing of the Statute of Westminster. The Sovereign Independence of South Africa. The Effect of the Statute of Westminster on the Entrenched Clauses of the South Africa Act.*—"Mr. Beyers then contended that no country which, like the Union, emerged from a Colony into a Dominion within the framework of the British Constitution can be a sovereign state unless it has a sovereign Parliament functioning bicamerally in the same manner as the British Parliament and that if this is not so in the case of the Union, it cannot be a sovereign state unless it breaks completely with its past and abolishes the monarchy. I cannot agree with this contention. It seems to me to be based on the fallacy that a Dominion Parliament must necessarily be a replica of the British Parliament despite the fact that all Dominion Parliaments have constitutions which define the manner in which they must function as legislative bodies. There is nothing in the Statute of Westminster which in any way suggests that a Dominion Parliament should be regarded as if it were in the same position as the British Parliament. Indeed it would be surprising if the British Parliament in enacting the Statute of Westminster, which was agreed to by all Dominions, had gone out of its way to change the Constitution of a Dominion without a request from that Dominion to do so. I have looked in vain at the official reports of the Imperial Conferences which led up to the passing of the Statute for any request by the Union to the British Parliament for an alteration of its Constitution. On the contrary the authoritative voice of the Union, as embodied in the joint resolution of the two Houses of Parliament, made it abundantly clear that the Union did not desire any amendment of its Constitution and emphasized that the proposed Statute of Westminster should in no way derogate from the entrenched provisions of the South Africa Act.

"A State can be unquestionably sovereign although it has no legislature which is completely sovereign. As Bryce points out in his *Studies in History and Jurisprudence* (1901 ed., Vol. II, p. 53), legal sovereignty may be divided between two authorities. In the case of the Union, legal sovereignty is or may be divided between Parliament as ordinarily constituted and Parliament as constituted under section 63 and the proviso to section 152. Such a division of legislative powers is no derogation from the sovereignty of the Union and the mere fact that that division was enacted in a British Statute (*viz.*, the South Africa Act) which is still in force in the Union cannot effect the question in issue.

"I find it impossible to uphold the implications of Mr. Beyers' contention, *viz.*, that after the passing of the Statute

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of Westminster the Union found itself with a Constitution that had been radically altered—a Constitution which enabled Parliament to sit either bicamerally or unicamerally, no matter what the subject-matter of the legislation might be. The South Africa Act, the terms and conditions of which were, as its preamble shows, agreed to by the respective Parliaments of the four original Colonies, created the Parliament of the Union. It is that Act and not the Statute of Westminster which prescribes the manner in which the constituent elements of Parliament must function for the purpose of passing legislation. While the Statute of Westminster confers further powers on the Parliament of the Union, it in no way prescribes how that Parliament must function in exercising those powers. Mr. Beyers took up the standpoint that the earlier part of sub-section (2) of section 2 of the Statute of Westminster was sufficient for his purposes but that the same result as he contended for would be reached on the concluding words, *viz.*,

'... the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act (*i.e.*, any Act of the Parliament of the United Kingdom) . . . in so far as the same is part of the law of the Dominions.'

I need not repeat my views on the earlier part of the sub-section. What I have said on that part is sufficient to dispose of the contention that the concluding words of the sub-section have destroyed the efficacy of the entrenched clauses of the South Africa Act; for once it is clear that Parliament means Parliament functioning in accordance with the South Africa Act, the concluding words of the sub-section carry the matter no further.

"Great reliance was placed by respondents' counsel on the case of *Moore and Others v. The Attorney-General for the Irish Free State and Others*¹ ([1935] A.C. 484). The decision in that case may be summarized as follows (*cf.* p. 498): 1. The Anglo-Irish Treaty of 1921 and the Constituent Act of the Irish Parliament, respectively, form parts of the Statute law of the United Kingdom, each of them being parts of the following Imperial Acts: the Irish Free State (Agreement) Act, 1922, and the Irish Free State Constitution Act, 1922. 2. Before the passing of the Statute of Westminster it was not competent for the Irish Free State Parliament to pass an Act abrogating the Treaty because the Colonial Laws Validity Act forbade a Dominion Legislature to pass a law repugnant to an Imperial Act. 3. The effect of the Statute of Westminster was to remove the fetter which lay upon the Irish Free State Legislature by reason of the Colonial Laws Validity Act. That

¹ See *Annual Digest*, 1935-1937, Case No. 22.

legislature can now pass Acts repugnant to the two Imperial Acts of 1922.

" Paragraph 1 applies to the South Africa Act but paragraphs 2 and 3 do not, for, as I have already pointed out, the Colonial Laws Validity Act at no time prevented the Union Parliament from amending or repealing any provision of the South Africa Act or in other words from passing an Act repugnant to the South Africa Act which is an Act of the Imperial Parliament, such repugnancy having been specifically authorized by the South Africa Act.

" Before the passing of the Statute of Westminster the Union Parliament had unrestricted power to amend the South Africa Act, provided only that on certain subjects it functioned in accordance with the requirements of sections 35 and 152. The Irish Parliament was not limited in respect of the method of passing Acts on particular subjects; once it had, in May, 1929, extended the period of its sole amending powers from eight to sixteen years from 1922, those powers were not limited by the referendum requirements of Article 50. Unlike the Union Parliament, however, its powers of amendment of the constitution, though internally unlimited, were limited by the terms of the Treaty, which had the force of law in terms of the two United Kingdom Acts of 1922. Once the Statute of Westminster removed the Colonial Laws Validity Act and empowered the Irish Parliament to pass acts repugnant to the United Kingdom Acts extending to Ireland the provision in Article 50 that amendments to the constitution had to be in terms of the Treaty fell away. That provision was an external limitation resting only upon the inviolability of United Kingdom statutes at the hands of Colonial Legislatures and it disappeared when that inviolability was removed in the case of Dominions. That was, as I see it, the basis of the decision in *Moore's* case. That case is for all these reasons not an authority in favour of the respondents. . . .

" Reference was also made on behalf of the respondents to a large number of writers on constitutional law who hold that the entrenched clauses of the South Africa Act are, as a result of the Statute of Westminster, of no binding force. When the works of those writers are carefully examined it will be found that they base their views on one or other of the following grounds:

" 1. The repeal of the Colonial Laws Validity Act. As I have shown the repeal of that Act did not in any way affect the provisions of the South Africa Act.

" 2. The concluding portion of section 2 (2) of the Statute of Westminster. I have already stated my opinion that the words ' the Parliament of a Dominion ' in that portion of section 2 (2) must be construed in the light of the South Africa

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Act and so construed mean Parliament sitting either bicamerally or unicamerally in accordance with the requirements of the South Africa Act. . . .

"4. The decision of this Court in *Ndlwana's* case, *supra*, which I shall examine presently.

"The conclusion at which I have arrived in no way affects the sovereignty of the Union. As a result of section 4 of the Statute of Westminster the British Parliament can no longer pass an Act extending to the Union 'unless it is expressly declared in that Act that the Dominion (*i.e.*, the Union) has requested and consented to the enactment thereof.' This provision has by necessary implication been amended by section 2 of the Status of the Union Act, 1934, which enacts that no Act of the British Parliament passed after the coming into force of the Statute of Westminster 'shall extend, or be deemed to extend, to the Union as part of the law of the Union, unless extended thereto by an Act of the Parliament of the Union.' Moreover, the Status of the Union Act amended the South Africa Act in certain important respects, the effect of which was to put on a legal footing the constitutional practice which had prevailed for some years that the King should in regard to Union affairs act on the advice of his Union Ministers. The amendments which I refer to were those which abolish the requirement that certain Bills should be reserved for the King's pleasure. The only case in which, after the passing of the Status of the Union Act, a Bill had to be reserved for the King's pleasure was a Bill relating to an appeal to the King-in-Council under section 106 of the South Africa Act. With the repeal of that section by Act 16 of 1950, this one exception has been removed. Consequently the Union is an autonomous state in no way subordinate to any other country in the world. To say that the Union is not a sovereign state, simply because its Parliament functioning bicamerally has not the power to amend certain sections of the South Africa Act, is to state a manifest absurdity. Those sections can be amended by Parliament sitting unicamerally. The Union is, therefore, through its Legislature able to pass any laws it pleases and it would be as false to say that the Union is not a sovereign state as it would have been to say that the Republic of the Orange Free State was not a sovereign state on the ground that it was provided in section 26 of its Constitution that no amendment could be made to it save by a three-fourths majority of the Volksraad in two successive annual sessions. To go further afield, it would be surprising to a constitutional lawyer to be told that that great and powerful country, the United States of America, is not a sovereign independent country simply because its Congress cannot pass any legislation which it pleases. . . ."

The Chief Justice then went on to discuss *Ndlwana's* case in detail. He considered that the question of the effects of the Statute of Westminster had not been exhaustively argued before the Court in that case ; and that, therefore, the Appellate Division, after so complete an examination of the Statute of Westminster in the present proceedings, was justified in departing from its previous decision. Act 46 of 1951 was an Act which fell within section 35 of the South Africa Act ; that section was still of full force and effect ; and, therefore, the Separate Representation of Voters Act was invalid in the light of the Constitution, for it had not been passed by a two-thirds majority of both Houses sitting together, as required by the Constitution.

[Report: 1952 (2) S.A. 428 [A.D.].]

British Commonwealth of Nations—Sovereignty of the Dominions—Legislative Competence of New Zealand—Prior to Adoption of the Statute of Westminster—Application of the Colonial Laws Validity Act—Meaning of the Phrase “Repugnant to the Laws of England”—Doctrine of Extra-territoriality in Relation to Dominion Legislation—Nature of the Judicial Committee of the Privy Council—Whether an Integral Part of the New Zealand Constitution—Whether Parliament of New Zealand has Jurisdiction to Confer Power on the New Zealand Court of Appeal to Grant Leave to Appeal to the Privy Council in Such Cases. Case No. 16

WOOLWORTHS (NEW ZEALAND), LTD. *v.* WYNNE.

New Zealand, Court of Appeal of Wellington.

(Stanton, Hay and Adams JJ.)

June 6, 1952.

THE FACTS.—Woolworths Ltd., in New Zealand, were convicted by a Stipendary Magistrate of the criminal offence of selling certain tablets in contravention of the Pharmacy Act, 1939. The firm appealed to the Supreme Court on a point of law by way of a Case Stated, under the Justices of the Peace Act, 1927, and the case was removed into the Court of Appeal in pursuance of section 5 of the Justices of the Peace Amendment Act, 1946.

The procedure involved, as summarized by Adams J. in the course of his judgment, was as follows:

“ There are two modes of appeal from Justices provided by the Justices of the Peace Act, 1927. There is, first, the right of general appeal under section 315, the procedure being by rehearing of the evidence, and, secondly, the right of appeal by way of Case Stated on a point of law under section 303.

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Sections 4 and 5 of the Justices of the Peace Amendment Act, 1946, are as follows:

'4. On the hearing by a Justice of any information or complaint which he has power to determine summarily, the Justice may state a case for the opinion of the Supreme Court on any question of law arising in the matter.

'5. (1) The Supreme Court may order the removal into the Court of Appeal of any case transmitted to the Supreme Court under section 303 of the principal Act or of any case stated under section 4 of this Act; and on removal the Court of Appeal shall have the same power to adjudicate on the proceedings as the Supreme Court had.

'(2) On the removal of any case to the Court of Appeal under this section, the decision of the Court of Appeal shall be final as regards the tribunals of New Zealand; and the same judgment shall be entered in the Supreme Court, and the same execution and other consequences and proceedings shall follow thereon, as if the decision had been given in the Supreme Court:

'Provided that the Court of Appeal may give leave to either party to appeal to the Privy Council.'"

Woolworths' appeal was dismissed by the Court of Appeal, and the company thereupon requested leave to take the case to the Judicial Committee of the Privy Council, in terms of section 5 (2) of the Justices of the Peace Amendment Act, as above quoted. The question then arose whether this section of the Act was *intra vires* the legislative powers of the Dominion Parliament. This method of granting leave to appeal was not authorized by the Privy Council Appeals Rules of 1910, as this was a criminal matter. The Statute of Westminster was not adopted by New Zealand until 1947, and, thus, the Colonial Laws Validity Act was of full force and effect in the Dominion when the amendments to the Justices of the Peace Act were passed in 1946—amendments in terms of which authority was sought to grant leave to appeal to the Privy Council in the present case. It was argued, therefore, that the paragraph of section 5 (2) granting such authority was *ultra vires* the powers of the New Zealand Legislature in that it purported to have extra-territorial effect, the Privy Council being an English Court, and in that it was repugnant to the laws of England, as the Privy Council's Rules gave no authority to Dominion Courts to grant leave to appeal in such circumstances. In other words, appeals to the Judicial Committee in criminal cases could only be by way of special leave, granted by the Privy Council itself.

Held (Stanton J. dissenting): that leave to appeal should be granted. Section 5 (2) of the Justices of the Peace Amendment Act was within the legislative competence of the Parliament of New Zealand. It did not purport to have an extra-territorial effect, the Privy Council acting in appeals from New

Zealand as an integral part of the Dominion Constitution. It was not repugnant to the laws of England, as no English statute forbade the granting of leave to appeal in such cases.

I. *Powers of Colonial Courts to Grant Leave to Appeal to the Judicial Committee of the Privy Council.*—The Court said (*per Adams J.*):

“ Her Majesty the Queen, in virtue of her prerogative, has authority to review the decisions of all Colonial Courts, whether the proceedings be of a civil or of a criminal character, except in so far as Her Majesty has parted with such authority (*Falkland Islands Co. v. The Queen* (1863) 1 Moo. P.C.C.N.S. 299, 312; and Bentwich’s *Privy Council Practice*, 3rd ed., p. 22). But appeals to the Privy Council are always by leave, such leave being either leave granted by the local Court in exercise of a delegated power to grant it, or special leave granted by the Sovereign in Council (*ibid.*, 23). The Court from which the appeal rises has no power to grant leave ‘ unless first authorized by some enactment, such as an Order in Council ’ (*ibid.*, 104). The instrument by which such authority is given is commonly spoken of as a charter or grant, or appeals of right (*ibid.*, 103), in contra-distinction to appeals by special leave. Where no appeal lies by right of grant, or where the Colonial Court has no power to grant leave, an appeal can proceed only on special leave granted by the Privy Council (*ibid.*, 116). In respect of New Zealand, the Order in Council of January 10, 1910, empowers our Courts to grant leave to appeal in certain cases, the right of Her Majesty to grant special leave to any person ‘ aggrieved by any judgment of the Court . . . being expressly preserved by R. 28. . . . ’

“ The case before the Court is a Case Stated by way of appeal on point of law . . . removed into the Court of Appeal pursuant to section 5 of the Justices of the Peace Amendment Act, 1946. . . . That section has given this Court a new jurisdiction, enabling it, on an order for removal being made by the Supreme Court, to determine questions of law arising in proceedings before Justices; but it has pleased our Legislature, in conferring this new jurisdiction, to provide that this Court may give leave to appeal to the Privy Council. . . . The leave is intended to be an effective grant of leave. In the solemn form of an Act of Parliament, this Dominion has, in effect, asked that such appeals be heard by the Privy Council on leave granted by this Court, and the question is whether this Court must stultify that request by declining jurisdiction on the ground that our Legislature has exceeded its powers. If so, there can be no appeal in the present case unless by special leave of the Privy Council. . . .

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"The desired leave cannot be granted by this Court in pursuance of the Order in Council of January 10, 1910. *Chung Chuck v. The King* ([1930] A.C. 244) shows conclusively that the Order in Council, which is similar in terms to the Order in Council discussed in that case, does not give this Court jurisdiction to grant leave in criminal matters; and shows also that the present case is such a matter. . . . But it is important to note that *Chung Chuck v. The King* goes no further, for present purposes, than the proposition that leave cannot be granted in pursuance of the Order in Council, and has no bearing on the question whether a Dominion Legislature may authorize a grant of leave to appeal. There was in that case no statutory provision, such as section 5 (2) of our Justices of the Peace Amendment Act, 1946, and the Court of Appeal of British Columbia, which had in fact granted leave, clearly had no jurisdiction to grant such leave unless such jurisdiction could be found in the relevant Order in Council. These remarks apply equally to *Gordon-Cuenca v. The King* ([1944] A.C. 105), in which *Chung Chuck's* case was cited. The statement there made—that, in a criminal matter, 'If such leave is given, it must be by His Majesty in Council' (at p. 110)—must be read in the light of the immediately preceding sentence. It is true where there is no Order in Council or other charter applicable to criminal matters, and is generally true by reason of the nonexistence of such charters. But the whole of the elaborate reasoning in *Chung Chuck's* case would have been unnecessary if it were legally impossible that there should be an appeal as of right in criminal matters in pursuance of a charter constituted by Order in Council or other sufficient legislative authority. All that the two cases establish in this connection is that, as a matter of construction, the relevant Orders in Council do not apply to criminal matters.

"The jurisdiction of the Privy Council extends undeniably to criminal as well as civil cases: *Reg. v. Bertrand* ((1867) L.R. 1 P.C. 520, 530) and *Nadan v. The King* ([1926] A.C. 482, 491). But, in regard to criminal matters, there is, apart from section 5, no grant or charter whereby any Court in New Zealand may give leave to appeal. It has not been the practice to delegate authority in such cases; and, in exercising its undoubted power to grant special leave, the Privy Council has kept within narrow limits. As was said in *Nadan v. The King*: 'It has for many years past been the settled practice of the Board to refuse to act as a Court of criminal appeal, and to advise His Majesty to intervene in a criminal case only if and when it is shown that, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done' (*ibid.*, 495).

“ The reluctance of the Judicial Committee to interfere in criminal cases, and the limitation of the grounds on which such appeals will be entertained, are, I think . . . a matter of practice, and not of jurisdiction; and the practice is founded on the obstruction which a contrary practice would offer to the administration of justice in the Dominions and Colonies. . . . The jurisdiction is unlimited, but its exercise is in practice rigidly circumscribed. . . .

“ In the argument before us, it was, I think, assumed that this rule of practice in regard to criminal appeals is something so fixed and immutable that no criminal appeal could possibly be entertained unless the case were brought within the existing rule. This would mean, in effect, that the rule of practice is stronger than a Dominion statute. In one sense, of course, that is true. Our Legislature cannot compel the hearing of appeals by the Privy Council. But I venture humbly to believe that neither our Legislature nor their Lordships would think in terms of compulsion; and to me it seems unlikely that their Lordships would hold themselves so rigidly bound by the rule of practice that the expressed wishes of a Dominion Legislature would fall on deaf ears. . . .

“ For my part, I can see no reason in principle why the power to grant leave in criminal cases should not be conferred on a Colonial Court by Order in Council or other proper legislative authority, or why the grounds on which such appeals may be entertained by the Judicial Committee should not be enlarged beyond existing practice by similar legislation, or, indeed, by decision of the Judicial Committee itself. I am content to assume that, if leave can properly be granted in this case, the hearing of the appeal will not be frustrated merely on the ground that it is not the sort of case in which the Privy Council will normally grant special leave to appeal. The question remains whether there is proper legislative authority in this case.”

II. *The Legislative Competence of the Parliament of New Zealand. The Restrictions Imposed by the Colonial Laws Validity Act. Meaning of the Words “Repugnant to the Laws of England.”*—“The legislative power of the Parliament of New Zealand derives from section 53 of the New Zealand Constitution Act, 1852 (15 and 16 Vict., c. 72). The relevant part of section 53 reads as follows:

‘It shall be competent to the said General Assembly (except and subject as hereinafter mentioned) to make laws for the peace, order, and good government of New Zealand, provided that no such laws be repugnant to the laws of England. . . .’

“In order to understand what is meant by the words ‘repugnant to the laws of England,’ it is necessary to refer to

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sections 2 and 3 of the Colonial Laws Validity Act, 1865 (28 and 29 Vict., c. 63)¹ . . .

" It will be observed that there is both a positive and a negative provision. A colonial law is void if repugnant to the provisions of an Imperial statute extending to the Colony, or to any order or regulation made under the authority of such a statute or having in the Colony the force and effect of such a statute. There is, on the other hand, no repugnancy to the law of England unless there is repugnancy to such a statute, order or regulation.

" The two enactments last mentioned remained fully operative with reference to New Zealand until the adoption of the Statute of Westminster, 1931, by our Statute of Westminster Adoption Act, 1947. They were accordingly applicable to section 5 of the Justices of the Peace Amendment Act, 1946, when it was passed. The proviso to sub-section 2 of section 5 is, therefore, void if repugnant to the law of England; but, whether it may or may not fail of effect on some other ground, it cannot be held repugnant to the law of England unless it be repugnant to some such Act, order, or regulation as is contemplated by sections 2 and 3 of the Colonial Laws Validity Act, 1865.

" Putting aside for the moment any question of invalidity on any other ground, and considering only the question of repugnancy within the meaning of these statutes, I am unable to see that there is any repugnancy. I have examined, *inter alia*, the Privy Council Appeals Act (2 and 3 Will. IV, c. 92), the Judicial Committee Act, 1833 (3 and 4 Will. IV, c. 41), the Judicial Committee Act, 1843 (6 and 7 Vict., c. 38), the Judicial Committee Act, 1844 (7 and 8 Vict., c. 69), and the New Zealand Constitution Act, 1852, and know of no other relevant statutes. I have also considered the Order in Council of January 10, 1910, and the Judicial Committee Rules, 1925, and know of no other relevant regulations or orders. I find nothing in all this legislation to which the proviso to section 5 (2) can be said to be repugnant. It cannot be said to be authorized thereby, but that is a different question. If the Order in Council of January 10, 1910, has no application to criminal matters, there can certainly be no conflict with its provisions, and the statute, in so far as it affects criminal matters, may go beyond, but cannot infringe, those provisions.

" In my opinion, the Order in Council of January 10, 1910, has no application whatever to criminal matters. The contrary view might be suggested on the ground that, according to the terms of the prefatory enacting clause, the rules laid down are to 'regulate all Appeals to His Majesty in Council from the

¹ See above, p. 40.

Dominion of New Zealand'. The argument, I think, must run as follows: (a) that the Order in Council applies to all appeals; (b) that it provides in rule 2 that 'an appeal shall lie' in certain cases on leave granted by the Court appealed from; and (c) that, accordingly, by necessary implication, the granting of leave to appeal in any cases other than those specified is prohibited. It must be remembered that it is not enough, in considering this question of repugnancy, to say that the Order in Council does not provide for the granting of leave by the local Court in a criminal matter. To raise a case of repugnancy, one must find in the Order an express or implied prohibition.

"Now, the Order in Council has been construed in *Chung Chuck v. The King* (*supra*), in such a way that, when one passes from the preliminary enacting words—'the rules hereunder set out shall regulate all appeals'—and comes to the Rules themselves, they have no bearing at all on criminal appeals. . . . There is no reason to doubt that the Order in Council that was before their Lordships in *Chung Chuck's* case was similar in all material respects to our Order in Council. Dealing there with the argument that the use of the word 'decision' in the definition of 'judgment' in rule 1 was sufficient to bring in criminal matters, their Lordships said: 'Finally, if one looks through the Order in Council itself one sees there a great number of provisions for the purpose of dealing with cases where leave to appeal is given which are entirely appropriate in civil matters and not only inappropriate to criminal matters but criminal matters do not appear to be provided for if they are included within the word "decision".' . . .

"I think the whole tenor of the judgment in *Chung Chuck's* case is in favour of the view that our Order in Council has no bearing on criminal matters; and, once one accepts (as one must respectfully do) the construction put in the judgment on the specific provisions contained in the Order, it seems impossible to treat the general words in the recitals, or the words 'all appeals' in the preliminary enacting clause, as having so wide an intent as to justify the implication of any prohibitory provision with reference to criminal appeals. In my opinion, the Order has no bearing at all on criminal matters, either expressly or by any legitimate implication.

"I think, therefore, that the proviso of sub-section 2 of section 5 cannot be said to be repugnant to the Order in Council of January 10, 1910."

III. *Invalidity of Dominion Legislation, Prior to the Adoption of the Statute of Westminster, which has Extraterritorial Effect. Meaning of "Extraterritorial" in this Context. Position of the Judicial Committee of the Privy Council as an Integral Part*

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of the Constitution of the Dominion of New Zealand.—"Another ground on which, before our adoption of the Statute of Westminster, 1931, an enactment of our Legislature might be held invalid was that arising from the doctrine forbidding extra-territorial legislation—a doctrine described by Viscount Sankey, Lord Chancellor, delivering the judgment of their Lordships in *British Coal Corporation v. The King*¹ ([1935] A.C. 500), as 'a doctrine of somewhat obscure extent' (at p. 520). *Ex facie*, there is nothing extraterritorial about the proviso to sub-section 2 of section 5. It confers a power exercisable in New Zealand by a Court constituted and sitting in New Zealand. Whether a grant of leave in pursuance of the proviso may be acted upon in London by Her Majesty in Council is another matter; but, whatever may be the value there of the leave that is granted, the giving of authority to a local Court to grant such leave in New Zealand is not on the face of things an exercise of extraterritorial jurisdiction on the part of our Legislature, nor does the granting of such leave appear to be an exercise of extraterritorial jurisdiction on the part of the Court. The objection on the ground of extraterritoriality can arise only if one looks beyond the granting of leave by our Court to the hearing of the appeal by their Lordships and its allowance or disallowance by Her Majesty. But, while this narrower and more technical view may be arguable, I shall assume that it is proper to consider, not what may be done in New Zealand, but what may fall to be done abroad in pursuance of the leave granted.

"When the first petition for liberty to appeal from the newly constituted Irish Free State came before the Privy Council in 1923 in *Hull and Co. v. M'Kenna* ((1926) I.R. 402), Viscount Haldane presiding, with Lord Buckmaster and Lord Parmoor in attendance, made some preliminary remarks with reference to the general principles governing appeals to the Privy Council. He began by reminding counsel that, while the Sovereign himself gives the judgment in full Privy Council, he does so on the report of the Judicial Committee, and that, although the Committee is in form and in name a Committee of the Privy Council, its members act judicially, and there is, in substance, a strictly judicial proceeding. He then proceeded as follows: 'What is the position of the Sovereign sitting in Council in giving formal effect to our advice, and what are our functions in advising him? The Judicial Committee of the Privy Council is not an English body in any exclusive sense. It is no more an English body than it is an Indian body, or a Canadian body, or a South African body, or, for the future, an Irish Free State body. There sit among our numbers, Privy

¹ See *Annual Digest*, 1935-1937, Case No. 21.

Councillors who may be learned Judges of Canada—there was one sitting with us last week—or from India, or we may have the Chief Justice, and very often have had them from the other Dominions, Australia and South Africa. I mention that for the purpose of bringing out the fact that the Judicial Committee of the Privy Council is not a body, strictly speaking, with any location. The Sovereign is everywhere throughout the Empire in the contemplation of the law. He may as well sit in Dublin, or at Ottawa, or in South Africa, or in Australia, or in India as he may sit here, and it is only for convenience, and because we have a Court, and because the members of the Privy Council are conveniently here that we do sit here; but the Privy Councillors from the Dominions may be summoned to sit with us, and then we sit as an Imperial Court which represents the Empire, and not any particular part of it.’

“These remarks warrant the view, if warrant be needed, that Her Majesty and Her Majesty’s Judicial Committee are so intimately a part of our constitution that we have no occasion—at any rate, in matters of legal theory—to consider them as beings apart who belong to a different land. Their geographical location is an incidental feature, and their association with our constitution is, I think, on a proper view, as close and intimate as if they were continually present here. . . .

“I have already referred to the passage in *British Coal Corporation v. The King* (*ante*) where it is said that ‘the doctrine forbidding extraterritorial legislation . . . is a doctrine of somewhat obscure extent’. The existence of the doctrine in some form or another is not in question, though the Imperial Parliament seems to have felt some doubt about it, as evidenced by the declaratory form of section 3 of the Statute of Westminster, 1931. Apparently it was intended to leave open the view that a Dominion might already have possessed the power to make laws have extraterritorial operation even apart from the section; and the question whether this is the true construction, so as to give retrospective effect to the section, was argued in *Croft v. Dunphy*¹ ([1933] A.C. 156, at p. 167), but was left undetermined, and is still undetermined. . . . It may well be, and I think it is, true that the doctrine was not sufficiently extensive to have any bearing at all on the regulation of Privy Council appeals.

“That the doctrine was not absolute is sufficiently clear from a consideration of *Croft v. Dunphy*, where it was held to be within the powers of the Canadian Legislature to extend the provisions of its anti-smuggling legislation beyond territorial limits so as to permit search and seizure of a vessel within twelve miles of the Canadian coast. The judgment did not

¹ See *Annual Digest*, 1931–1932, Case No. 82.

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rest on any supposition that such action was within the territorial limits, but rested on the view that, in matters of the kind there in question, a jurisdiction extending beyond territorial waters was conceded by international law and usage, and that a Sovereign State might legislate accordingly. . . . The test of a Dominion's legislative power is not whether its legislation is intraterritorial. If the topic is within the powers, and requires or justifies a statute having extraterritorial operation, then there may be extraterritorial legislation. . . . What was said in *Croft v. Dunphy* is as much applicable to New Zealand as to Canada, and the decision is later in date than *Nadan v. The King* ([1926] A.C. 482).

"So far as I can gather, questions as to the competence of Colonial Legislatures to deal with appeals to the Privy Council have arisen in the past, not with the authorization of such appeals, but only with regard to their prohibition. In *Nadan's* case, the Judicial Committee had to consider section 1025 of the Criminal Code of Canada, which provided that, notwithstanding any royal prerogative, no appeal should lie in any criminal case to Her Majesty in Council. The section was held to be invalid. The decision was authoritatively explained in *British Coal Corporation v. The King* as based on two grounds only—viz., (i) that the section was repugnant to the Judicial Committee Act, 1833, and the Judicial Committee Act, 1844, and, therefore, void under section 2 of the Colonial Laws Validity Act, 1865; and (ii) that it could be effective only if construed as having an extraterritorial operation. . . . After the decision in *Nadan v. The King*, and before the decision in *British Coal Corporation v. The King*, the Statute of Westminster, 1931, had been passed—not requiring legislative adoption in Canada—and section 1025 had been re-enacted by the Canadian Statute 23 and 24 Geo. V, c. 53, s. 17; and, in *British Coal Corporation v. The King*, this new enactment was held valid, the difficulties as to repugnancy and extraterritoriality being removed by the Statute of Westminster, 1931.

"On the question of extraterritoriality, the crucial—and, indeed, the only—reference to the subject in *Nadan v. The King* is the following sentence: 'But however widely these powers (section 91 of the British North America Act, 1867) are construed they are confined to action to be taken in the Dominion; and they do not appear to their Lordships to authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal' . . .

"From the sentence quoted above, their Lordships in *Nadan's* case proceeded immediately to the question of repugnancy, holding section 1025 to be repugnant to the Judicial Committee Act, 1833, and the Judicial Committee Act, 1844.

This in itself was a clear and sufficient ground of decision. The question of extraterritoriality does not seem to have been argued by counsel, and was disposed of in the single sentence I have quoted. . . . Nevertheless, in *British Coal Corporation v. The King*, the Board construed the judgment in *Nadan's* case as resting on the two grounds of extraterritoriality and repugnancy; and I must respectfully accept that view of the judgment. But the Board in *British Coal Corporation v. The King* was not concerned with the soundness of the grounds of decision in *Nadan's* case. It was sufficient to say—and, apart from elucidating the judgment, this was all that was said—that the Statute of Westminster had removed both of the difficulties on which that decision was grounded. This was expressed in the following passage: 'It is true that before the Statute (of Westminster), the Dominion Legislature was subject to the limitations imposed by the Colonial Laws Validity Act and by section 129 of the (British North America) Act, and also by the principle or rule that its powers were limited by the doctrine forbidding extraterritorial legislation, though that is a doctrine of somewhat obscure extent. But these limitations have now been abrogated by the Statute' (at p. 520).

"The reference to the obscure extent of the doctrine of extraterritoriality seems deliberate and significant. It is as if their Lordships had desired to enter a *caveat* against the supposition that they accepted the view that the legislation in question was extraterritorial. . . ." [After discussing the similar attitude of the Board in *Moore v. Attorney-General for Irish Free State*¹ ([1935] A.C. 484) the Judge continued:] "I repeat that I am not questioning the existence of the rule as to extraterritoriality, but only its application in this context.

"But there is more. It was necessary for their Lordships in *British Coal Corporation v. The King* to interpret the peace, order, and good government clause of the British North America Act, 1867. They did so on the footing that, since the Statute of Westminster, there was no longer any limitation on the ground of extraterritoriality. Their judgment is accordingly not a direct authority on the question of extraterritoriality. But they drew the constitutional picture in a form which is, in my humble judgement, plainly inconsistent with the view that regulation or prohibition of the right of appeal to the Privy Council is extraterritorial legislation, and which accords with the views of Lord Haldane quoted above. . . . Their Lordships said: 'It may now be considered whether there is since the Statute (of Westminster) any sufficient reason why this matter of the special or prerogative appeal to the King in Council should be treated, as according to the contentions on behalf

¹ See *Annual Digest*, 1935-1937, Case No. 20.

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of the petitioners it should be treated, as being something quite special and as being a matter standing, as it were, on a pedestal by itself. Ought it not to be treated as simply one element in the general system of appeals in the Dominion? The appeal, if special leave is granted, is from the decision of a Canadian Court, and is to secure a reversal or alteration of an order of a Canadian Court: if it is successful, its effect will be that the order of the Canadian Court will be reformed accordingly. Rights in Canada and law in Canada will thus be affected. The appellant and respondent in any such appeal must be either Canadian citizens or persons who have submitted to the jurisdiction of the Canadian Courts. Such appeals seem to be essentially matters of Canadian concern, and the regulation and control of such appeals would thus seem to be a prime element in Canadian sovereignty as appertaining to matters of justice. But it is said that this class of appeal is a matter external to Canada: emphasis is laid particularly on the fact that the Privy Council sits in London, and that in form the appeal by special leave is not to the Judicial Committee as a Court of law, but to the King in Council exercising a prerogative right outside and apart from any statute. As already explained, this latter proposition is true only in form, not in substance. But even so the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian Court and which concludes and reaches its consummation in the Canadian Court. What takes place outside Canada is only ancillary to practical results which become effective in Canada. And the appeal to the King in Council is an appeal to an Imperial, not merely British, tribunal. . . .

" . . . It is, I think, impossible to reconcile the views of their Lordships quoted above with reference to the constitutional position in regard to Privy Council appeals with the idea that the regulation and control of such appeals is, or ever was, a matter extraterritorial to a fully self-governing Dominion. As a Judge of this Dominion, I emphatically reject that idea, and hope the emphasis with which I do so may not seem impertinent or provoke resentment in any quarter. Until we adopt the Statute of Westminster, the power of our Legislature to legislate with reference to the regulation and control of Privy Council appeals was limited in so far as such legislation might be repugnant to the Judicial Committee Acts or the Orders in Council of January 10, 1910, and May 2, 1925, or might otherwise be repugnant to the laws of England within the meaning of section 2 of the Colonial Laws Validity Act, 1865. This limitation rested on an Imperial statute which was an integral part of our constitution. On the other hand,

the supposed limitation on the ground of extraterritoriality rests on a highly technical rule of law—a rule of law which, though no doubt valid and operative within some limits, was of uncertain scope, and the application of which in this context would be a shocking technicality, and out of harmony with the true constitutional relations between the Sovereign and the self-governing Dominions. . . .”

[Report: (1952) N.Z.L.R. 496.]

NOTE.—Hay J., concurring, stated in a short separate judgment that he was in full agreement with the observations of Adams J., as above reported.

Stanton J., dissenting, took the view that the New Zealand Legislature was not competent to “enlarge”, by any domestic Act, “the rights of litigants so as to give them a right of appeal additional to those provided for in the Imperial Orders in Council”. He reviewed the relationship that had grown up between the Dominion and the Privy Council, concluding that: “The grant of a right to appeal has always resided in the Privy Council, except to the extent that it has been delegated. So far as New Zealand is concerned, in civil cases there has been by grant an appeal as of right in certain cases, and an appeal at the discretion of the Court of Appeal or the Supreme Court in certain other cases. . . . There is no power to enlarge such rights; that would be to go far beyond regulation and control. In criminal cases, no right of appeal has ever been conferred by any Imperial Order in Council. Now by the Justices of the Peace Amendment Act, 1946, the New Zealand Parliament has purported to authorize an appeal in a criminal matter which is additional to and beyond any right of appeal authorized by the Imperial Order in Council. The duty of this Court in an opposed application seems to me to be to determine as best it can whether the applicant has made out a right to the leave he asks for, and, unless it is satisfied that this has been done, his application should be refused, and the matter could then be dealt with by the Privy Council itself, which, in an application for special leave to appeal, would doubtless consider it a relevant fact that our Legislature had purported to grant a right of appeal in such a case as this.”

British Commonwealth of Nations—Nationality—Effect of British Nationality Act of 1948 and Citizenship Acts of the Dominions—Those who may Claim the Status of British Subject—The Law of Ceylon. Case No. 17

SUDALI ANDY ASARY *v.* VAN DEN DREESEN.

Ceylon, Supreme Court. February 22, 1952.
(Choksy A.J.)

THE FACTS.—On September 6, 1951, five men were arrested at Dickoya, in Ceylon. They were brought before the Magistrate's Court at Hatton and charged with the offence of “illicit

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landing" under the Immigrants and Emigrants Act, No. 20 of 1948. On the day appointed for the hearing of the case the prosecution declined to proceed for want of evidence, and requested that the accused be discharged. It was stated, however, that they would be re-arrested and imprisoned, pending expulsion, under deportation orders just received from the Minister of Defence and Foreign Affairs. The moment they left the Court they were taken into custody and, thereupon, the petitioner in the present case filed five writs of *habeas corpus* in respect of them. The men concerned were released on bail to attend the hearing of these petitions. It was agreed that the arguments advanced for the production of the body of one, Nadarajah, should be treated as arguments in all the cases.

It was contended, *inter alia*, on Nadarajah's behalf, that the deportation orders were *ultra vires* the powers granted to the Minister by the Immigrants Act. Under this the Minister had no power to order the deportation of a person who either fell into certain exempted categories or was "a citizen of Ceylon": this last phrase being defined as "a citizen of Ceylon under any law for the time being in force". The Act placed the onus of proving that he was "a citizen of Ceylon" on the person threatened with deportation. Counsel for the petitioner argued that Nadarajah, who had been born in India, was a British subject when he came to Ceylon in 1943. This status subsisted after Ceylon gained her independence, and after the passing of the Ceylon Citizenship Act, No. 18 of 1948. "Citizen of Ceylon" as used in the Immigrants and Emigrants Act was to be construed as applying to all those who were British subjects. Nadarajah, therefore, was not amenable to any deportation order issued by the Minister, such an order being *ultra vires*.

Held: that the order was valid. The onus of proving Nadarajah to be "a citizen of Ceylon" had not been discharged. The term "citizen of Ceylon" in the Immigrants and Emigrants Act was to be given the same meaning as "citizen of Ceylon" in the Citizenship Act. Nadarajah did not fall within this latter definition. Furthermore, he could not claim the status of a British subject after January 1, 1949, when the British Nationality Act of 1948 came into force, as from that date—in the words of the Court—"a 'British subject' is only one who in addition to owing allegiance to the Sovereign is a citizen either of 'the United Kingdom and Colonies' or of any of the specified self-governing units of the British Commonwealth of Nations, unless he falls within a transitory class." Counsel had denied that Nadarajah fell in this transitory class. The Judge said:

" The Solicitor-General's position (opposing the petition) was that the expression ' Citizen of Ceylon ' in the Immigration Act (which came into operation on November 1, 1949) must be given the same meaning as is contained in the Citizenship Act, which came into operation on November 15, 1948. He relied on Craies on *Statute Law* to support his contention that words used in a later statute must be presumed to have the same meaning as that attached to them in an earlier statute. He also stated that the definition of the expression ' Citizen of Ceylon ' in section 50 necessarily pointed to the meaning attached to that expression by the Citizenship Act which was enacted earlier and which deals with matters relating to citizenship.

" The Citizenship Act commences by stating that from the appointed date, namely November 15, 1948, ' there shall be a status to be known as " the status of a citizen of Ceylon " . ' Section 2 (2) proceeds to enact the two ways in which a person ' shall be or become entitled to the status of a citizen of Ceylon ' , namely by right of descent as provided in the Act, or alternatively, by virtue of registration, also as provided by this Act or by any other Act authorizing the grant of such status by registration in any special case. Every person who is possessed of that status is referred to in the Act as a ' citizen of Ceylon ' (section 2 (2)). A citizen of Ceylon may for any purpose in Ceylon describe his nationality by the use of the expression ' citizen of Ceylon ' . . .

" Mr. Suntherlingam (for the petitioner) argued that the expression ' citizen of Ceylon ' in section 50 of the Immigration Act means not only a citizen under the Citizenship Act but any person who can claim to be a citizen ' under any law for the time being in force ' . His contention is that there was a status larger than that created by the Citizenship Act, attached to all British subjects resident in Ceylon prior to the enactment of the Citizenship Act, which status he said was not taken away by the Act, that that larger status still subsists, and those claiming that larger status have all the rights, privileges, duties and obligations, which attach to the status of a citizen of Ceylon, as created and defined by the Citizenship Act. In other words, his position is that those persons who come within the expression ' citizen of Ceylon, ' as defined in the Citizenship Act, form only a section of the inhabitants of Ceylon from among those who were British subjects, previously resident in Ceylon, that those not within that definition are not outside the pale of citizenship, but that they are still possessed of all such rights of citizenship as they had and enjoyed except such as have been taken away or specially conferred by statutes. He said that the expression ' citizen of Ceylon ' as defined in

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the Act is only a part of the connotation conveyed by the expression 'British subject in Ceylon'. Indeed, his contention was that the status of a 'British subject in Ceylon' is equivalent to that of a 'citizen of Ceylon', the word 'citizen' being in modern terminology the equivalent of the word 'subject'. He relied on the definition of the term 'citizen' in vol. 3 of the *Encyclopaedia of the Laws of England* (2nd ed., p. 85) which states that 'citizen' is a term employed under the republican form of Government as the equivalent of the term 'subject' in monarchies of feudal origin. He also relied on the fact that the expression 'British subject' was still to be found in our laws. For example, he referred to Article 13 of the Ceylon (Constitution) Order in Council of 1946 which disqualified any person from election or appointment as a Senator 'if he is not a British subject or is by virtue of his own act under any acknowledgement of allegiance, obedience or adherence to a foreign power or state'—'British subject' being defined by Article 3 as 'any person who is a British subject according to the law for the time being of the United Kingdom, and any person who has been naturalized under any enactments of any of His Majesty's Dominions, and any person who is a citizen or subject of any of the Indian States . . .'. He contrasted this with the provisions of the Ceylon (Parliamentary Elections) Order in Council of 1946 where the expression 'British subject' occurred earlier but was removed and replaced by the expression 'citizen of Ceylon'. He utilized these provisions in support of his argument that both the status of a citizen of Ceylon and of a British subject resident in Ceylon co-existed today and that any 'British subject' who is resident in Ceylon—he said later he meant by 'resident' one who is domiciled in Ceylon—has nowhere been deprived of his rights as such and that, therefore, all the rights connoted by the expression 'British subject' continued intact except such rights as have been expressly taken away by statute. Neither the Ceylon Independence Act (George VI, ch. 7) nor the Ceylon Independence Order in Council of 1947 nor the Citizenship Act of 1948 had made any difference to that position, he said. The status and rights of a natural born British subject or of a naturalized British subject, in Ceylon, continued unaffected, he submitted.

"It cannot be gainsaid that the status of a British subject continues to attach down to the present day to all those born in any of her Majesty's territories and under allegiance to her Majesty, but does it therefore follow that every British subject has all the rights and privileges created or afforded by the civil laws of any Dominion in which he may have acquired a domicile or in which he may be resident for the time being?

“Strictly speaking the term ‘British subject’ is used to describe the nationality to which the person belongs, in the sense in which that term is used in international law. The nationality of a person in the broad sense describes the particular State which has jurisdiction over a person attached to that State by ties of allegiance to it; that nationality adheres to the person whether he is a resident within or outside the territory of that State, so long as he does not alter his subjection to that State or transfer his allegiance to another. The nationals of a State are all those persons which that State is under a duty to protect abroad. At English common law the basis of nationality was permanent allegiance to the Sovereign. All those born within any part of the territories of the British Crown and under allegiance to the Sovereign were called British subjects by birth. No distinction was made between persons born or naturalized in the United Kingdom, or descended from persons born in the United Kingdom, on the one hand, and those acquiring British nationality in similar ways in other British possessions, on the other hand.

“The British Nationality Act of 1948 was adverted to in the course of the argument but was not gone into as it did not appear to have a very direct bearing on the case. On an examination of its provisions it would appear as if they are of some assistance in considering the argument put forward by Mr. Suntherlingam that those British subjects resident in Ceylon, who are not ‘citizens’ of Ceylon within the Citizenship Act, have still a status which has not been taken away and which status enables them to claim and exercise all the rights and privileges attached to ‘citizens’ of Ceylon within the Citizenship Act, except of course such rights or privileges as may expressly be given by legislation only to those who are ‘citizens’ under the Citizenship Act. His argument was that wherever ‘citizens’ as defined by the Citizenship Act are intended to be referred to, then words would be used to explicitly say so, and that if the Immigrants Act had intended to refer to such ‘citizens’ only it would not have defined the expression ‘citizen of Ceylon’ by saying that it ‘means a citizen of Ceylon under any law for the time being in force’. The last words, he said, clearly indicated that the legislature had in mind not only ‘citizens’ under the Citizenship Act, but also ‘citizens of Ceylon’ in the broader sense, which status, he maintained, continued to exist, and under which his client was in the same legal situation as a ‘Ceylon citizen’ under the Citizenship Act and consequently not at all liable to deportation.

“The British Nationality Act creates citizenship of the United Kingdom as a sub-class within the status of a British

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subject and it would appear as if possession of that citizenship automatically confers the status of a British subject on such a person. With the progress of the larger overseas Colonies towards complete self-government the maintenance of the universal common status of a British subject became less and less practicable. Canada introduced the concept of a Canadian nationality and the Union of South Africa that of a Union nationality. There began to grow up distinct nationalities attached to each of the countries now forming members of the British Commonwealth, as they gained progressively greater and wider internal and external independence. From and after January 1, 1949 (that being the date on which the British Nationality Act came into force), the term 'British subject' seems to me to describe a person who enjoys the new status of a citizen of the United Kingdom and Colonies, or, alternatively, the status of a citizen of any of the specified British Commonwealth countries, according to the laws thereof. Indeed, section 1 (2) of that Act equates the expression 'British subject' with the expression 'Commonwealth citizen' in express terms and states that both expressions shall have the same meaning. The status of 'British subject' is also retained by certain residents of the Republic of Ireland, under certain circumstances, but others are purely and solely citizens of that Republic. Until citizenship laws are enacted and put into operation in every one of the specified Commonwealth countries there will exist a class of British subjects possessing no citizenship corresponding to the different communities within the British Commonwealth and such a person is designated 'a British subject without citizenship' and continues to remain such until he becomes a citizen either of 'the United Kingdom and Colonies' or a citizen of any of the Commonwealth countries referred to in section 1 (3) of the Act. The result appears to be that the term 'British subject' is equated to, and involves the possession of, the status of a 'citizen of the United Kingdom and Colonies' or a citizen of any of the Commonwealth countries specified in the Act, except in the case of the transitional class of those who are British subjects without citizenship because of the absence of laws in any particular territories of Her Majesty enabling them to qualify for citizenship in those respective territories.

"It will therefore be seen that as from 1949 the term 'British subject' takes on a new meaning. A person has thereafter the status of a British subject not merely by virtue of allegiance to Her Majesty but also because of the additional qualification that he is either a citizen of 'the United Kingdom and Colonies' or a citizen of any of the Commonwealth countries specified in the Act—unless he falls within the

temporary category of a 'British subject without citizenship'. In other words, citizenship of either 'the United Kingdom and Colonies' or of any of the above Commonwealth countries is an essential qualification for being a British subject, unless the person is within the transitional class of 'British subject without citizenship' which had to be specially created for those who are 'potential' citizens of that country until they blossom into actual citizens of that country when laws of citizenship are passed in that country. The distinction that existed before 1949 between a person who was not a natural-born British subject and other British subjects was removed by section 31 of the Act which assimilates the rights of a natural-born British subject to those of persons who have become British subjects by other ways than birth within the territory and allegiance of Her Majesty. Under the present state of affairs the status of a British subject cannot be claimed apart from the citizenship of either the 'United Kingdom and Colonies' or of any of the specified Commonwealth countries, except of course in the case of the special class of 'British subject without citizenship'.

"In view of this, it does not seem to be possible to maintain that from 1949 Nadarajah continued to enjoy the status of a British subject with whatever rights and privileges such a status may have connoted before that date (and as to which I express no opinion), because from 1949 a 'British subject' is only one who in addition to owing allegiance to the Sovereign is a citizen either of 'the United Kingdom and Colonies' or of any of the specified self-governing units of the British Commonwealth of Nations, unless he falls within the transitory class. Nadarajah would not, in the submission of Mr. Suntherlingam, fall into the transitory class. It is therefore unnecessary to consider that position further. His Counsel however maintained that Nadarajah was a 'citizen of Ceylon' in the broader sense for which he contended, by virtue of the mere fact of his having been born in British India in 1923 within the allegiance of His Majesty the late King George VI and his continued residence in Ceylon from 1943, in the same allegiance. That position, as it seems to me, is not maintainable. Nadarajah has not been proved to be a 'citizen of Ceylon' within the Citizenship Act, and not having been so proved, he was not, in my opinion, a 'citizen of Ceylon' to exempt himself from the provisions of the Immigrants Act to which those who are not 'citizens of Ceylon' are subject. Mr. Suntherlingam stated generally, in aid of his argument that Nadarajah was a 'Ceylon citizen', that his client was not a citizen of India either, as on September 6, 1951, the date of his arrest, in view of the provisions of the Constitution of India, since the people of India

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formed themselves into ' a Sovereign Democratic Republic ' as from November 26, 1949. A cursory view shows that Article 5 of this Constitution declares who were citizens of India as at the commencement of the Constitution. Article 8 affords rights of citizenship to certain persons ordinarily resident outside India, as at the date of the Constitution. Article 11 expressly reserves to the Parliament of India the power to make provisions with respect to the acquisition and termination of citizenship and other matters relating to citizenship.

" The question whether or not he was a citizen of India on the date of his arrest in September was not really discussed or gone into at the extended hearing of the arguments. However that may be, it does not follow that because he may not have been a citizen of India at the date of his arrest, in September last, he was necessarily a citizen of Ceylon at that date. If he was therefore not a citizen of either India or Ceylon, at the material date, then as he was not entitled in my view to call himself a British subject at all after January 1, 1949, it may well be that he was an ' alien ' within section 26 of the Citizenship Act of 1948. If that be the resulting position he was certainly liable to be dealt with under the provisions of the Immigrants Act. . . . "

[Report: (1952) 54 C.L.R. 66.]

British Commonwealth of Nations—Ruler of State in Pakistan Federation—Whether Entitled to Immunity before English Courts—Certificate of Commonwealth Relations Office—Whether Certificate Conclusive—Indian Independence Act, 1947—Pakistan Citizenship Act, 1951.

See Case No. 45 (*Sayce v. Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State*).

British Commonwealth of Nations—Privileges of Visiting Forces—Visiting Forces (British Commonwealth) Act, 1933.

See Case No. 46 (*Reeves v. Deane-Freeman*).

British Commonwealth of Nations—Extradition within—Whether Fugitive Offenders Act, 1881, applies between Republic of India and Great Britain—Political Offences.

See Case No. 76 (*Re Government of India and Mubarak Ali Ahmed*).

III.—Protected States and Protectorates

States—Protected States—Position in International Law.

See Case No. 51 (*Case Concerning Rights of Nationals of the United States of America in Morocco (France v. U.S.A.)*).

States—Protected State—Obligation of Equality of Treatment—Whether Protecting State Entitled to Preferential Treatment.

See Case No. 51 (*Case Concerning Rights of Nationals of the United States of America in Morocco (France v. U.S.A.)*).

IV.—Mandated and Trust Territories

v.—Nationality in Mandated and Trust Territories

Mandates—Nationality in Mandated Territories—Mandate for New Guinea.

See Case No. 58 (*Wong Man On v. The Commonwealth*).

D.—RECOGNITION

[See also above, A, IV, Recognition of Acts of Foreign States and Governments; and PART IV, JURISDICTION: A, I, Territorial.]

I.—Of States

States—Recognition of—Whether Recognition Imports that Recognized Government is in Effective Control of Territory—Effect of Lack of Such Control Upon Powers of a Consul of Recognized State—Continued Recognition of Estonia by the United States of America. **Case No. 18**

In re NIGGOL'S ESTATE.

United States, Surrogate's Court, Suffolk County, New York.
September 12, 1952.

THE FACTS.—Petitioner, who was recognized by the United States as the Consul of Estonia in New York, prayed that funds in the care of the Treasurer of Suffolk County be paid over to him, on behalf of the distributees of an Estonian estate. All but one of the distributees were not resident in Estonia; with respect to the share of the resident, the Consul alternatively prayed that it be paid into his blocked account. Notwithstanding the purported annexation of Estonia by Soviet Russia in 1939, the United States continued to recognize Estonia and her representatives in the United States.

Held: that the petition would be conditionally granted with respect to the shares of distributees not resident in Estonia. The Court said:

“Petitioner fails to support by any authority his request that the payment of all shares to distributees outside of Estonia be paid unconditionally. The Treaty of Friendship,

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Commerce and Consular Rights, Article XXIV, 44 Stat. 2388, upon which petitioner relies, reads as follows:

‘A consular officer of either High Contracting Party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in process of probate or accruing under the provisions of so-called Workmen’s Compensation Laws or other like statutes provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission.’

“Nowhere in said Article does it state that payment can be made to petitioner unconditionally but, on the contrary, it is precisely stipulated that payment can only be made to a consular officer ‘provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission.’ Petitioner has failed to furnish to this Court or the Treasury of Suffolk County, such reasonable evidence as indicated in the above Article XXIV of the Treaty.

“Therefore, with respect to the share of Alice Niggol, a resident of Estonia, the application should be denied. This Court takes judicial notice of the fact that the sovereignty of the Republic of Estonia, which petitioner represents, does not obtain in that country today. It would be impossible, therefore, at the present time, for petitioner to ‘remit (the share of Alice Niggol) through the appropriate agencies of his Government to the proper distributees.’

“The application with respect to the shares of the non-resident Estonian nationals, Emma L. Niggol (resident of British Zone of Germany; Aurelie Niggol, Karin Schwallbach, Nora Kalvik (residents of American Zone of Germany); Ottomar Niggol (resident of Canada); and Sigrid Mord (resident of New Mexico) should be granted. None of these persons are residents of areas of which it can be said ‘there is not a reasonable assurance that a payee in those areas will actually receive checks of warrants . . . and be able to negotiate them for full value.’ Code of Fed. Reg., tit. 31, section 211.3, subd. (a), as amd.; 16 Federal Register 1818. Cf. *In re Estate of Geffen*, 199 Misc. 756, 104 N.Y.S. 2d 409. There would appear to be no attempted circumvention of the effect or the spirit of section 269 of the Surrogate’s Court Act. Cf. *In re Getream’s Estate*, 200 Misc. 543, 107 N.Y.S. 2d 225; *In re Perlinsky’s Estate*, Sur.,

115 N.Y.S. 2d 549. Under these circumstances, it cannot be said that it appears that these persons 'would not have the benefit or use or control', Surrogate's Court Act, § 269, of their respective shares. Payment may be ordered to the Estonian Consul on behalf of these non-resident Estonian nationals. *Matter of Houston's Estate*, 145 Misc. 417, 424, 261 N.Y.S. 317, 324. However, the granting of this part of the application is made upon condition that petitioner furnish to the authority or agency making distribution of the funds through petitioner, reasonable evidence that the shares remitted thereto be received in full by the rightful owners . . . "

[Reports: 115 N.Y.S. 2d 557, 202 Misc. 290.]

NOTE.—With further respect to the distribution of legacies and distributive shares of persons adjudged to be geographically situated so as not to be able to receive them, see *In re Miller's Will* (1952) 115 N.Y.S. 2d 255, *In re Rysiakiewicz's Will* (1952), 115 N.Y.S. 2d 504, and *In re Yee Yoke Ban's Estate* (1951), 107 N.Y.S. 2d 221, 200 Misc. 499, (Case No. 93 in this volume and the cases there noted). See also the following cases noted in *New York Law Journal*: *Matter of Nixdorf* (August 7, 1952, p. 214), *Estate of Bondy* (November 6, 1952, p. 1073), *Estate of Grisbako* (March 10, 1952, p. 958), *Matter of Hirsch* (August 26, 1952, p. 314), *Matter of Kudlich* (January 4, 1952), *Matter of Wakarecy* (August 7, 1952, p. 214), *Estate of Sternfeld* (June 16, 1952, p. 2507), *Estate of Nagy* (October 16, 1952, p. 830), and *Estate of Zoch* (June 17, 1952, p. 2398).

The Court in *In re Podkowik's Estate* (1952), 114 N.Y.S. 2d 710, citing the Nuremberg Trial of the Major War Criminals before the International Military Tribunal, took judicial notice of the fate of persons of Jewish extraction residing in Lithuania between 1939 and 1945, for purposes of establishing presumptive death. See also *Matter of Schreiber*: *New York Law Journal*, April 30, 1952, p. 1732, *Matter of Bender*, *ibid.*, July 1, 1952, p. 7, and *Matter of Berchard*, *ibid.*, December 14, 1951.

Recognition—Of States—Effect of Non-Recognition on Nature of Hostilities—Non-Recognition of Israel by Arab States.

See Case No. 115 (*Diab v. Attorney-General*).

II.—Of Governments

Case No. 19 Recognition—Of Governments—Retroactive Effect of—Withdrawal of Recognition—Whether Offer made by Former Government Retroactively Invalidated—Areas of *de facto* Authority—Recognition and Jurisdiction of Government-in-Exile—Form of Certificate of Secretary of State—Whether Conclusive against Retroactive Effect.

GDYNIA AMERYKA LINIE ŻEGLUGOWE SPÓŁKA AKCYJNA v.
BOGUSŁAWSKI AND ANOTHER.

England, House of Lords. July 11, 1952.

(Lords Porter, Oaksey, Morton, Reid and Tucker.)

THE FACTS.—This was an appeal from a decision of the Court of Appeal whereby that Court affirmed a judgment by Finnemore J. in favour of the respondents Bogusławski and Krupke.¹

In 1940 the Polish Government, which had escaped from Poland when that country was occupied by the Germans, established itself in London and was recognized by the British Government as the Government of Poland. Under a Polish Statute of 1939 it controlled the Polish merchant navy, which now had its home ports in England. About the beginning of July 1945, it became apparent that the British Government was going to withdraw recognition of the Polish Government in London and to accord recognition to the new Polish Government being formed at Lublin in Poland. On July 3, a Mr. Kwapinski, Minister of Industry, Commerce and Shipping in the London Government, acting as supreme manager of the Polish shipping companies, informed the representatives of the Polish Seamen's Union that any officers and men of the Polish merchant navy who left their ships on account of the change of Government would be entitled to a gratuity of three months' salary. On July 5, a telegram in these terms was sent by the Minister, through the curator of the appellant shipping company, to the master of the *Morska Wola*, a motor vessel of the company, then lying in Manchester. It was read to the officers on the same day and to the men the following day.

At midnight of July 5–6, the British Government recognized the new Lublin Government, the Polish Provisional Government of National Unity, as the Government of Poland.

Acting on the telegram of July 5, the respondents, an officer and a seaman of the *Morska Wola*, left the ship on

¹ For a report of the earlier proceedings and a fuller statement of the facts see *Annual Digest*, 1949, Case No. 20.

account of the change of Government. In an action by them against the appellant company for payment of the compensation alleged to be due to them, the company denied liability and contended that the recognition of the new Polish Government by the British Government on midnight of July 5-6, 1945, operated retroactively to June 28, 1945, when it was formed, with the result that the acts of the London Polish Government done after that date were invalidated.

The Foreign Secretary had issued the following certificate at the request of the parties:

“1. Up to and including midnight of July 5-6, 1945, His Majesty's Government in the United Kingdom recognized the Polish Government having its headquarters in London as being the Government of Poland, and as from midnight of July 5-6, 1945, His Majesty's Government in the United Kingdom recognized the Polish Provisional Government of National Unity as the Government of Poland, and as from that date ceased to recognize the former Polish Government having its headquarters in London as being the Government of Poland.
2. On June 29, 1945, the following message to the Prime Minister from the head of the said Polish Provisional Government of National Unity was handed by the Polish Ambassador in Moscow to His Majesty's Ambassador in Moscow: ‘I have the honour to notify you that as a result of the understanding reached in Moscow between representatives of Warsaw Provisional Government and Polish Democratic leaders invited from Poland and from abroad under the auspices of the Commission of Three set up at the Crimea Conference, the Provisional Government of National Unity was formed this June 28 according to Article 45 of the constitution of Polish Republic, 1921. The Provisional Government of National Unity has realized in their entirety decisions of the Crimea Conference on the Polish question. At the same time I have the honour, in the name of the Provisional Government of National Unity, to approach His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland with a request for the establishment of diplomatic relations between our nations and for exchange of representatives with the rank of ambassadors.’
3. I am advised that the question of the retroactive effect of recognition of a Government is a question of law for decision by the courts.”

Held: that the decision of the Court of Appeal upholding the judgment of Finnmere J. for the plaintiffs, the present respondents, must be affirmed. Even assuming that the recognition of the new Polish Government might date back to June 28 in Poland, where it had effective control, that control did not extend to the old Polish Government in London nor to the Polish merchant fleet in England, so that in respect of

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them the operative date of the recognition was July 5-6 and there was no retroactive effect.

On the true construction of the Polish laws the Minister of Shipping in the old Polish Government had the power, so long as that Government was recognized, to enter into an obligation on behalf of the appellant company to pay the promised gratuities.

Per Lord Morton of Henryton: the certificate of the Secretary of State on its true construction excluded retroactive operation of the recognition and the certificate was conclusive.

Lord Porter, after stating the facts and the conclusions on the facts at which Finnemore J. had arrived, continued:

"In the first place it is said that though recognition of the new Government only took place on July 5-6, yet that recognition harks back to the moment at which the new Government is shown to have come into power as the established Government of the country, and that moment is June 28. There cannot, it is submitted, be two Governments of the same country at the same time, and from June 28 onwards the only lawful authority was that of the new Government. It follows, it is contended, that Mr. Kwapinski was no longer minister or supreme controller of the appellant company or entitled to give any orders or make any contracts in their name after June 28.

"Admittedly proof of recognition must depend upon the production of a certificate from the Foreign Secretary of this country pronouncing the fact of recognition and the time at which it is granted. Its effect, may, however, depend, at any rate to some extent, on its terms and therefore it is desirable that it should be set out in full. It reads as follows: [His Lordship read the document and continued:] Two views of the effect of this certificate have been propounded to your Lordships. For the respondents it is argued that the certificate in plain terms specifies the moment at which the change of Government took place. Up to the end of July 5 on this view the old Government was in power, thereafter the new. There is no scope for any argument as to the retroactive effect of an acknowledgment of change of Government.

"On the other hand, the appellants say that the certificate does not delineate the moment at which the British Government recognized that one Government had ceased to have authority and another had begun. It means only that at a particular moment the British Government realized that the new Government had come into power and recognized it as then having control, but said nothing as to when that control began except what is to be found in the statement contained in clause 2.

"There is, it is true, no certificate of the British Government to the effect that the new Government was in *de facto* control

of metropolitan Poland by June 28, but that circumstance seems to have been recognized : if it were not, there appears to be no reason for the insertion of clause 2 or for the observation contained in clause 3.

“ Though I am myself prepared to accept the view that the new Government was the *de facto* Government of metropolitan Poland from and after June 28, the question has yet to be answered whether it was at that time in control of Polish citizens elsewhere or of their ships wherever they might be. For the purposes of the present case, however, so wide a problem need not be considered. It is enough to ask whether between June 28 and July 6 the new Government were in *de facto* control of the members of the old Government when resident in London and then recognized as the *de jure* government of all Poland and of the ships and crews present in this country and elsewhere. Obviously it was not exercising such control, but the argument presented on behalf of the appellants maintains, as I understand it, that there can be here no question of divided control. The only Polish territory is that of metropolitan Poland and individual property or ships whether in that country or elsewhere are, therefore, subject to, and subject only to, the acknowledged Government of that country. There cannot be two Governments of a single State.

“ The proposition may in ordinary circumstances be true, but where a state of war exists it is not entirely accurate. After the old Government reached this country, there were in fact two authorities to be taken account of even in metropolitan Poland: (1) the occupying German forces, and (2) the old Government which was recognized by this country as the *de jure* Government of all Poland and of all Polish citizens and their property and as the *de jure* and *fe facto* authority over all Polish citizens, their property and ships outside Poland itself. It was, no doubt, an anomalous position, but the anomaly was due to the unprecedented position under which recognition was granted to an exiled Government centred in this country. Therefore, although I am prepared to accept that the recognition of the new Government dates back to June 28 in Poland where that Government had effective control, I am of opinion that that control did not extend to the old Government or the Polish merchant fleet and its personnel until July 6, 1945, from which date the old Government accepted the change, as indeed they had to. A further suggestion was put forward, I think, for the first time, in your Lordships’ House, that as the official seat of the Polish fleet is at Gdynia, the acting Polish Government had from its inception control over the fleet and its members. The argument lacks substance. At best it means no

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more than that between June 28 and July 6 the new Government might have taken some steps which they could enforce in Gdynia. What they could have done was not suggested to your Lordships, but perhaps the simplest answer to this argument is that in fact they did nothing.

“ The appellants, however, put forward the contention that once the whole soil of Poland is shown to have been *de facto* controlled from June 28 by the new Government, all its nationals owe allegiance to it from that date, and their property is taken out of the control under which it formerly was held and became subject to the new Government. It was not like a case where the territory is divided and one Government controls one part and another another.

“ Upon this question some light is thrown by the American case of the *Guaranty Co. v. United States*,¹ in which the result of the recognition of the Soviet Republic, sixteen years after it became *de facto* Government of Russia, was discussed. The question there was whether notice of the repudiation of an obligation which had been transmitted to those representing the Kerenski Government during the time at which it was recognized by the American Government was effective to bring into play a statute of limitations and so defeat the claim when ultimately presented by the Soviet Government after it was recognized. It was admitted there, as it was here, that in the ordinary case recognition of a new Government is retroactive to the time at which it is shown or acknowledged to have been in control, and for this the English decision in *Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.*² was relied on, a decision which may now be reinforced by a reference to *Lazard Brothers & Co. v. Midland Bank, Ltd.*³ and other cases. But that admission does not affect transactions carried through under the old régime. As was said in the case in question:⁴ ‘ The argument . . . ignores the distinction between the effect of our recognition of a foreign Government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals. The one operates only to validate to a limited extent acts of a *de facto* Government which, by virtue of the recognition, has become a Government *de jure*. But it does not follow that recognition renders of no effect transactions here with a prior recognized Government in conformity to the declared policy of our own Government’. It was suggested that that decision was limited to cases where the transaction took place with nationals of the recognizing country. I can see no reason in principle for doing so, and it

¹ 304 U.S. 126

³ [1933] A.C. 289.

² [1921] 3 K.B. 532.

⁴ 304 U.S. 126, 140.

must be remembered that for many years the Kerenski Government had been but a shadow, whereas, in the case now under consideration, the old Government had been active and both capable of controlling and in effective control of the Polish merchant fleet.

" Mr. Kwapinski was, in my view, still Minister of Industry, Commerce and Shipping." [His Lordship here considered the Minister's powers in respect of the appellant company, and, after reading Articles 2, 13 and 19 of the Polish Act of March 30, 1939, Article 474 (2) of the Code of Obligations of the Polish State, dated October 27, 1933, and the relevant paragraphs of a Polish regulation dated May 1, 1942, came to the conclusion that there was no qualification on the Minister's powers except the requirement of honesty, and that under Article 19 of the Act of 1939 he was enabled to do anything that the company itself might do, and that there was no reason for limiting his authority to a state of actual warfare. After considering other questions of Polish law, which he decided in favour of the respondents, His Lordship held that the result of the meeting of July 3, 1945, was that the Minister, in his capacity as supreme commander of the appellant company, made an offer which he caused to be communicated to each member of the crews and which they were free to accept by word or action. His Lordship then continued:] " In reaching this conclusion I find myself in agreement with Cohen L.J. in thinking that the offer made by Mr. Kwapinski remained in force, even if he had ceased to have authority to make it, from July 6 onwards. No doubt the new Government disapproved of it but they never withdrew it, and the contention that it continued in force is supported by Article 66 of the Code of Obligations which has been translated: ' An offer or an acceptance of an offer remains valid notwithstanding that the person who expressed it died, or became incapable of legal action before the contract was made, unless contrary transpires from the expression of will (intention) of the parties or from the circumstances.' This offer, in my opinion, remained valid unless it was withdrawn, and though I can find evidence of objection, I can find none of withdrawal.

" For these reasons, which, in spite of some variations, are substantially those entertained by the learned judge and the Court of Appeal, the appeal in my opinion fails . . ."

Lord Oaksey considered first the questions of Polish law and then continued:

" I desire to add a few observations on the construction which should be placed on the certificate of the British Foreign Secretary. The appellant company's argument is that paragraph 2 of that certificate proves that the new Polish

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Government was formed on June 28, 1945, and that the recognition of that Government by the British Government as from midnight of July 5-6, 1945, contained in paragraph 1 of the certificate, is therefore retroactive in all spheres to June 28, 1945. In my opinion this construction of the certificate contradicts the express recognition of the old Government up to and including midnight of July 5-6, 1945, also contained in paragraph 1 of the certificate, and is therefore untenable. It is true that the recognition *de jure* by the British Government of a foreign Government may in certain circumstances have a retroactive effect over a period before the recognition. In the absence of any intimation from the Foreign Secretary of the length of that period or the sphere in which the retroactive effect of the recognition is to operate it may be necessary for British Courts to go into the facts on these matters. Each case must be decided on its own facts. The recognition of the two Polish Governments with which your Lordships are concerned and the spheres in which those Governments have exercised acts of sovereignty are not the same as those in other cases, such as those of Russia, Spain or Abyssinia. The old Government had exercised acts of sovereignty in England and on the high seas and elsewhere over Polish nationals and Polish ships from the time that that Government came to England, and the recognition of that Government in the Foreign Secretary's certificate was, in my opinion, a recognition of that sovereignty. Your Lordships are not concerned with acts by the old Government, if there should be any, which trench upon or conflict with the *de facto* sovereignty which may have been acquired by the new Government on its alleged formation on June 28, 1945. Nor is paragraph 2 of the certificate, even if read as recognizing the fact of the formation of the new Government in Poland on June 28, 1945, a recognition that that Government had sovereign powers outside Poland between June 28, 1945, and July 5-6, 1945. If it had been intended by the British Government to put an end to the recognition of the old Government as from the alleged date of the formation of the new Government, the Foreign Secretary would doubtless have said so, but, on the contrary, he certified expressly that the British Government recognized the old Government up to and including midnight on July 5-6, 1945.

"There are two cases which I think support the view that retroactivity of recognition should be confined to spheres of *de facto* control. In the case of *Banco de Bilbao v. Sancha*¹ General Franco's *de facto* control over Bilbao was held to oust the sovereignty of the Republican Government although at the

¹ [1938] 2 K.B. 176.

material time the Republican Government was recognized by the British Government as the *de jure* Government of the whole of Spain. Similarly, in the present case, even after the recognition of the new Government as the *de jure* Government of Poland, that Government would not have had sovereign powers over Polish nationals in England if the old Government had been still recognized as *de facto* in control of Polish nationals in England. And in the *Guaranty Trust Co. v. United States*,¹ the Supreme Court of the United States held that the retroactive effect of the recognition of the Soviet Government by the United States Government in 1933 did not extend to transactions which the Provisional Government of Russia had entered into with the United States nationals within the United States. It is true that the decision was in part based upon the fact that the transactions had been entered into by the Provisional Government with United States nationals, but it was also based upon the fact that the transactions had been entered into in the territory of the United States in which the Provisional Government was recognized by the United States as a sovereign Government and in which at the time the Soviet Government enjoyed neither control nor recognition.

"I agree, therefore, that the appeal should be dismissed."

Lord Morton of Henryton said:

"My Lords, in response to a request by the parties to this action, a certificate was issued by the Foreign Office and signed by the then Foreign Secretary, in the following terms: [His Lordship read the document and continued:]

"The first question which arises on this appeal is as to the construction and effect of this certificate, and this is a question of English law. The document must, of course, be read as a whole, but in my view paragraph 1 contains three simple and unambiguous statements. If the Foreign Secretary had certified merely that His Majesty's Government recognized the Polish Provisional Government of National Unity as the Government of Poland, the recognition might well have a retroactive effect, and in order to ascertain the date as from which such recognition became effective, it would be necessary for the Court to go into past history and ascertain the date on which that provisional Government acquired effective control of Poland. It seems to me, however, that no principle of retroactivity can come into operation in the case of a certificate in the terms of paragraph 1, which states in precise terms the moment 'as from' which the new Government became the recognized Government of Poland. As I read the document, the Foreign Secretary has been at pains to exclude any possible retroactive effect by stating (1) that up to a particular moment

¹ 304 U.S. 126, 140.

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of time His Majesty's Government recognized the old Polish Government as being the Government of Poland; (2) that *as from* that moment of time His Majesty's Government recognized the new Polish Government as the Government of Poland, and (3) *as from* that moment ceased to recognize the old Polish Government.

"The formula employed in paragraph 1 differs in this respect from all the other Foreign Office certificates set out in the cases to which your Lordships were referred. The formula seems to me a most convenient one, and I see no reason to doubt that it was deliberately adopted in the present case. It fixed, once and for all, the moment at which change over took place in the eyes of His Majesty's Government.

"I have carefully considered whether paragraphs 2 and 3 of the certificate should lead me to form a different view as to the construction of paragraph 1, but I see no ambiguity in paragraph 1 and the following two paragraphs do not, in my view, raise any doubt as to its meaning. Paragraph 2 contains merely a statement of fact, *viz.*, that on June 29, 1945, a message to the Prime Minister from the head of the Provisional Polish Government of National Unity, the terms of which are set out, was handed by the Polish Ambassador in Moscow to His Majesty's Ambassador in Moscow. The paragraph contains no comment upon the contents of that letter. If the Foreign Secretary had intended to convey to the parties to these proceedings a statement that the new Government was effectively in control of any particular tract of country on June 28, 1945, I cannot believe that he would have taken this method of conveying it to the parties. I have no doubt that this certificate was carefully worded, with due regard to the purpose for which it was given, and I think that paragraph 2 means exactly what it says and no more. Paragraph 3 is merely a statement of advice which has been given to the Foreign Secretary. I cannot see that it throws any light upon the meaning of paragraph 1.

"It was strenuously contended by Mr. Pritt that paragraphs 2 and 3 must have been put in for some purpose and that they serve no useful purpose whatsoever unless they are intended to qualify in some way the meaning which would otherwise attach to paragraph 1. I would agree that there seems no very good reason for the insertion of these two paragraphs, but in my view, if the Foreign Secretary had intended to qualify in some way the statements made in paragraph 1 he would not have done it by this extremely roundabout and obscure method. I can only suppose that it was thought well that the parties should have the information conveyed by paragraph 2, while paragraph 3 would appear to have been inserted, *ex abundantia*

cautelae, to remove any idea that the Foreign Secretary was purporting to decide a question of law.

"If I am right so far, there can be no doubt that up till midnight of July 5-6, 1945, so far as the Courts of this country are concerned, Mr. Kwapinski continued to hold his office as minister. This being so, the appellant company continued to be 'under his supreme management' and the board of management of that company continued to be his 'executive organ' up to the same point of time.

"On this footing, I am satisfied that the respondents are entitled to the sums which they claim, for the reasons which are about to be stated by my noble and learned friend, Lord Tucker. I agree that this appeal should be dismissed."

Lord Reid stated the facts, then continued:

"The argument for the appellants is that it is a general principle of our law that the recognition of a new Government of a foreign country is retrospective and dates back to the time when that new Government was first established even though at that time the new Government was not in fact in a position to exercise sovereign powers over all the subjects of that country. It is said that the British Government could not simultaneously recognize two different Governments as the Government of Poland and, therefore, if the recognition of the new Government has to be dated back so also must the derecognition (if I may use the word) of the old Government be dated back to the same time. The period between the establishment of the new Government in Poland and its recognition by the British Government has been conveniently called the twilight period, and the appellants' argument is that, because our recognition of the new Government must be dated back to the beginning of the twilight period, therefore our recognition of the old Government must now be held by our Courts to have been withdrawn from the beginning of that period, with the result that acts of ministers of the old Polish Government in this country during the twilight period must now be held to have been invalid and incapable of creating rights which the Courts of this country can enforce. This appears to me to be a startling proposition, and, indeed, the appellants do not seek to carry it to its logical conclusion. They say that an exception has been recognized in the United States of America (*Guaranty Trust Co. v. United States*¹): that this exception, though far reaching, is based not on principle but on convenience; that this exception might well be recognized in this country also; but that if it were it would not avail the respondents in this case. I shall have to return to this matter, and I shall only say at this stage that,

¹ 304 U.S. 126.

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if it is found that a principle cannot be applied without the introduction of an anomalous and far-reaching exception, one may be inclined to doubt the soundness of the principle.

"The respondents' answer is twofold. They admit that there is a general principle that recognition of a new foreign Government is in certain respects retrospective; but they say, in the first place, that the form of the British Government's recognition of the new Polish Government in this case was such as to exclude that principle and, secondly, they say that the principle is much narrower than that put forward by the appellants and that *Guaranty Trust Co. v. United States*¹ is not an exception to the principle but an example of its application. They say that the principle does not involve any antedating of the withdrawal of the recognition of the old Government.

"The first argument for the respondents depends on the true meaning and effect of the certificate given by the Secretary of State for Foreign Affairs in connection with this case. Such a certificate is conclusive at least to this extent. The Courts of this country are bound to recognize as the Government of a foreign country a Government which has been recognized by the British Government and cannot recognize any Government which has not been so recognized, and, where recognition has been withdrawn by the British Government from one Government and accorded to another, our Courts are bound to accept as facts statements of the British Government with regard to that change. I need not consider whether our Courts are always bound to accept every statement in a Foreign Office certificate no matter what it may be because there is no suggestion that there is anything in this certificate which should not be accepted. But a certificate, like any other document, must be interpreted by the Court in order to find out what it means.

"This certificate contains three paragraphs." [His Lordship here cited the first paragraph of the certificate.]

"If this paragraph stood by itself I should be inclined to think that it was intended to exclude any retrospective effect of the change of recognition. The certificate does not state that the new Government was recognized at midnight of July 5-6. It states that it was recognized 'as from midnight', and the certificate does not merely state as a historical fact that the old Government was recognized up to that time: it goes on to state that 'as from that date' the British Government ceased to recognize the old Government. This appears to me to imply that the British Government still recognizes that the old Government was the Government of Poland up to that date and to be inconsistent with any inten-

¹ 304 U.S. 126.

tion that the withdrawal of recognition should be in any way retrospective.

"But paragraph 1 does not stand alone. In paragraph 2 a message from the new Polish Government is quoted in which the head of that Government states that it was formed on June 28. I cannot see what the purpose of the Secretary of State could be in quoting this message if he thought that the recognition of the new Government had no retrospective effect. And paragraph 3 seems to make it impossible to suppose that the Secretary of State intended to prevent any retrospective effect, because he said that he was advised 'that the question of retroactive effect of recognition of a Government is a question of law for decision by the courts'.

"I find the interpretation of the certificate taken as a whole to be a matter of considerable difficulty, but one thing I think is clear. Whether or not it puts the respondents in a better position than they would be in if the certificate were in more general terms, it certainly does not put them in a worse position. So I shall assume that the certificate was not intended to modify and does not modify, the general principle of the retroactivity of recognition, and I shall proceed to consider what this is. If the respondents can succeed on this issue then it will be unnecessary to determine the precise meaning of the certificate or what effect it would have if it were intended to modify the general principle.

"There is ample authority for the proposition that the recognition by the British Government of a new Government of a foreign country has at least this effect. It enables and requires the Courts of this country to regard as valid not only acts done by the new Government after its recognition but also acts done by it before its recognition in so far as those acts related to matters under its control at the time when the acts were done. But there appears to be no English authority which goes beyond that. I do not accept the argument for the appellants that this necessarily or logically involves ante-dating for all purposes the withdrawal of the recognition of the old Government. I do not see anything strange or even difficult in our saying that we still recognize that the old Government was the Government of Poland up to midnight of July 5-6 but that we also now accept the validity of certain acts done by the new Government before that time and while it was still unrecognized by us. Apart from the distinction between recognition *de jure* and recognition *de facto* which does not affect this case, we cannot recognize two different Governments of the same country at the same time, and the British Government did not in fact recognize both the old and the new Government at the same time. But I do not think that it is inconsistent

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with this principle to say that the recognition of the new Government has certain retroactive effects, but that the recognition of the old Government remains effective down to the date when it was in fact withdrawn. I can see that there might be difficulties if the old Government had purported before withdrawal of recognition to take some action with regard to matters already under the control of the new Government, but that does not arise in this case.

“ Counsel for the appellants criticized views expressed in the Court of Appeal that the acts of the old Government are valid at any rate unless and until the new Government rescinds or repudiates them, and argued that this was a novel and unsound doctrine. There are, however, many legislative or administrative acts of a Government which its successor can undo or nullify in one way or another. I doubt whether more was intended than that there might be cases in which the new Government could do this. If it was intended to suggest that acts of the old Government which could not have been repudiated or rescinded if they had been done before the twilight period can be repudiated or rescinded simply because they were done during the twilight period although relating to matters still under the control of the old Government, then I see no reason why that should be so. But it is unnecessary to decide that because there is no evidence that the new Government made any attempt to nullify the acts of the old Government on which the respondents rely.

“ I ought also to notice another argument for the appellants. The domicile of the appellant company is in Gdynia, and it is said that the affairs of the company must be regulated by the law for the time being in force there: on July 3, 1945, Gdynia was under the control of the new Government and the old Government had no authority there. The short answer to that argument is that there is no evidence that the new Government was in control of Gdynia on July 3, but, apart from that, I think that the argument is unsound. The respondents do not rely on any articles of association or statutes of the appellant company as conferring powers on the Minister; they rely on powers conferred on the Polish Government by Polish legislation, and the Government entitled to operate such powers in London on July 3 was the Government which was then recognized as the Government of Poland by the British Government.

“ I have derived much assistance from the judgment of the Supreme Court of the United States in *Guaranty Trust Co. v. United States*,¹ and I do not think that anything that I have said is in conflict with any part of it. The appellants found

¹ 304 U.S. 126.

upon this sentence in that judgment¹: 'The argument thus ignores the distinction between the effect of our recognition of a foreign Government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals'. They fasten upon the words 'transactions consummated' and 'our own nationals', and argue that if the transaction with the old Government had not reached the stage at which it could be said to have been consummated, or if the transaction was not between the old Government and a British subject, but was between the old Government and a Polish subject then it was not within the *ratio decidendi* of the *Guaranty Trust* case.² I do not so read that judgment; it appears to me that those words were used because they fitted the facts of that case and the real distinction stated in the sentence which I have quoted seems to me to be between acts of the new Government 'within its own territory prior to recognition' and transactions with the old Government 'here' while it was still recognized. So reading the judgment I am in complete agreement with it. It follows that Mr. Kwapinski's acts on July 3, 1945, are no less valid than they would have been if done before the beginning of the twilight period."

[Report: L.R. [1953] A.C. 11.]

Recognition—Of Governments—Retroactivity of Recognition—Withdrawal of Recognition—Validity of Transactions Concluded Prior to Withdrawal of Recognition—Question of Good Faith—Transactions Allegedly Intended to Embarrass or Defeat the Interests of the Newly Recognized Authority—Recognition by the United Kingdom of the Central People's (Communist) Government of China.

**Case
No. 20**

CIVIL AIR TRANSPORT INCORPORATED *v.* CENTRAL AIR
TRANSPORT CORPORATION.

Hong Kong, Supreme Court.

(Sir Gerard Howe C.J.)

May 21, 1951.

Supreme Court (as Court of Appeal).

(Gould and Scholes JJ.)

December 28, 1951.

Judicial Committee of the Privy Council.

(Viscount Simon, Lord Normand, Lord Oaksey, Lord Reid,
Sir Lionel Leach.)

October 13, 1952.

THE FACTS.—The principal facts of this case are stated in the case of *Civil Air Transport Incorporated v. Claire Lee*

¹ 304 U.S. 140.

² *Ibid.*, 126.

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Chennault and Others (Central Air Transport Corporation).¹ In that case the Hong Kong Supreme Court dismissed the action against the plaintiff, an organ of the Central People's Government of China, on the ground that the action impleaded a sovereign Government recognized by the United Kingdom.

Subsequent to that judgment, Central Air Transport Incorporated brought, on May 19, 1950, an action against the Central Air Transport Corporation (C.A.T.C.) asking for a declaration that the aircraft in question were their property. Previously, on May 10, 1950, an Order in Council was issued which, in effect, eliminated the defence of jurisdictional immunity of foreign States in any subsequent proceedings. That Order in Council was, in part, in the following terms:²

"Whereas evidence has been produced to the Governor of Hong Kong that seventy aircraft now on the Government airfield at Kai Tak in Hong Kong are registered both in the United States of America and in China and, the aircraft not being State aircraft within the meaning of the Chicago Convention on International Civil Aviation, 1944, such dual registration is contrary to Article 18 of that Convention.

AND WHEREAS ownership of the aircraft is in dispute and there are conflicting claims to their possession,

AND WHEREAS it is just and desirable that the question of ownership of the aircraft and of right to their possession should be decided by a Court of Law before they are permitted to leave HONG KONG,

Now THEREFORE, His Majesty, in exercise of all powers enabling him in this behalf, is pleased, by and with the advice

¹ Hong Kong Law Reports, 34 (1950), p. 386 (see *International Law Reports*, 1950, Case No. 45).

² The reasons underlying this somewhat unusual step are explained in lucid detail in an article by "Aristeides" in *International Law Quarterly*, 3 (1950), p. 159, and summarized by Johnson in *British Year Book of International Law*, 29 (1952), p. 466, n. 1, in the following words: "It [the step] was taken because His Majesty's Government appeared to be confronted by a conflict of international obligations. On the one hand—assuming that ownership of the aircraft lay with the appellants—there was His Majesty's Government's obligation to protect foreign property in its territory, and it might be argued that, if the authorities in Hong Kong allowed the aircraft to fly away, they would have failed to protect property which belonged to the appellants. On the other hand—assuming that ownership of the aircraft lay with C.A.T.C.—there was His Majesty's Government's obligation to recognize the immunity from the jurisdiction of foreign sovereigns and their property. There was also the point, arising under the Chicago Convention on International Civil Aviation of 1944 (Cmd. 6614), that, if the documents relating to the aircraft were not in compliance with the civil aviation regulations of Hong Kong, the Hong Kong authorities had the right and perhaps the duty to prevent them from leaving Hong Kong. There were in respect of the aircraft two sets of documents, one issued by the Nationalist Government and the other issued by the Communist Government. The question, therefore, which were the correct documents depended on the ownership of the aircraft, and this latter question could not be settled by the courts unless the difficulty raised by the immunity issue was removed."

of His Privy Council, to order, and it is hereby ordered as follows:—

1. (1) In any action or other proceeding concerning the aircraft which may be instituted in the Supreme Court of Hong Kong after the date of coming into operation of this Order, it shall not be a bar to jurisdiction of the Court that the action or other proceeding impleads a foreign Sovereign State.

(2) If a defendant in any such action or other proceedings fails to appear, or to put in a defence, or to take any other step in the action or other proceeding which he ought properly to take, the Court shall, notwithstanding any rule enabling it to give judgment in default in such a case, enquire into the matter fully before giving judgment.

2. (1) If at any time after twenty-one days from the date of the coming into operation of this Order the Governor is satisfied that no action or other proceeding is pending to which subsection (1) of section 1 of this Order applies and in which, or as a result of which, the ownership of the aircraft or right to the possession thereof is likely to be finally determined, the Governor shall by Order published in the *Gazette* refer the question of ownership of the aircraft and right to the possession thereof to the Court for determination.

(2) On any such reference to the Court it shall enquire fully into and determine the questions notwithstanding reference may implead a foreign Sovereign State.

3. Any person claiming ownership or right to possession of any of the aircraft and aggrieved by the decision of the Court in an action or other proceeding or reference may appeal therefrom to the Full Court and from thence to His Majesty in Council, and such an appeal shall lie notwithstanding such person has not taken any part in previous proceedings. . . .”

It is also to be noted that, in addition to the questions to and answers from H.M. Government (reproduced in *International Law Reports*, 1950, at pp. 177 and 178) relating to the recognition of the Government of the Central People's Republic of China, two further questions were put and answered as follows:

“ Does His Majesty's Government recognize the People's Government as having become the *de facto* sovereign Government or the Government exercising effective control on October 1, 1949, when it was proclaimed, or any other date between that date and January 5, 1950, of the part of China of which the Nationalist Government had ceased to be the *de facto* Government ? ”

Reply of Foreign Office on March 13, 1950:

“ His Majesty's Government in the United Kingdom recognize that in the period between October 1, 1949 and January 5-6 1950, the Central People's Government was the *de facto* Government of those parts of the territory of the Republic of China

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over which it had established effective control and if control was established after October 1, 1949, as from dates when it so established control."

Additional question addressed by the Judicial Committee to the Foreign Office:

"Referring to the above reply of the Foreign Office on March 13, 1950, was there any declaration or other formal act by His Majesty's Government in the United Kingdom on October 1, 1949, or on any and what later date, recognizing the Central People's Government as the *de facto* Government, or is the reply to be understood as meaning that His Majesty's Government in the United Kingdom, answering on March 13, 1950, assert that their view was as stated in this answer but that there had been no declaration or other formal act of His Majesty's Government on October 1, 1949, or during the period mentioned which announced or implied *de facto* recognition?"

Reply of the Foreign Office dated July 28, 1952:

"The only communication relevant to this question made by His Majesty's Government to the Central People's Government during the period October 1, 1949, to January 6, 1950, was the following note, which was delivered by His Majesty's Consul-General in Peking on October 5, 1949. 'His Majesty's Government in the United Kingdom are carefully studying the situation resulting from the formation of the Central People's Government. Friendly and mutually advantageous relations both commercial and political have existed between Britain and China for many generations. It is hoped that these will continue in the future. His Majesty's Government in the United Kingdom therefore suggest that, pending completion of their study of the situation, informal relations should be established between His Majesty's consular officers and the appropriate authorities in the territory under the control of the Central People's Government for the greater convenience of both Governments and promotion of trade between the two countries.' This communication was not intended at the time when it was made either to constitute or to convey *de facto* recognition. Nevertheless the answer made by the Foreign Office dated March 13, 1950, to the questions addressed to it by the Hong Kong Courts and quoted in your letter is to be understood as meaning that His Majesty's Government in United Kingdom answering on that date asserted that their view was as stated in that answer."

Held (by Sir Gerald Howe C.J.): that the application must be dismissed. The transaction by which the aeroplanes were sold to the applicant was not a genuine and *bona fide* transaction. It was hostile to the interests of the Chinese people. Its main purpose was to embarrass the Central People's Government. Accordingly, the transaction was not valid or enforceable. This being so, the ownership and the right of possession must

be held to be with the Central People's Government of China. The Court said:

"The position then on December 12, 1949, when this contract was made, was that the Nationalist Government no longer exercised any effective control over the mainland of China; that Government was established outside Chinese territory; the aircraft were in Hong Kong and the members of the staff and employees having attorned to the Central People's Government. Subsequently the Courts of Hong Kong held, and, with respect, in my opinion rightly held, that these aircraft, were and had been in the possession and control of the Central People's Government. I will refer here to certain extracts from the document of sale:—

"(D) The Government is unwilling to sell or otherwise dispose of said physical assets or stock except upon the most binding assurances that after such sale or disposition they will not be used in any way for the benefit of or for the carriage of passengers or goods within, to or from the Communist areas of China"; and

"(6) Chennault and Willauer agree that the said assets shall not be used, directly or indirectly for the benefit of or for the carriage of passengers or goods within, to or from the Communist areas of China."

By normal diplomatic usage, and indeed to be inferred from the terms of the contract quoted above, the then Nationalist Government must have been fully alive to the probability of the withdrawal of recognition by His Majesty's Government in the near future and in fact this took place as from midnight January 5/6, 1950, and it is evident that this transaction was a device entered into with full knowledge by both parties, by which it was hoped that the aircraft might be prevented from passing to the Central People's Government on its recognition *de jure* for the references to "Communist areas of China" must relate to the areas controlled by that Government, recognized as the *de facto* Government of those areas.

"It is a transaction inimical to the Central People's Government and indeed, as the aircraft were used for a public purpose within and without China, inimical to the interests of the Chinese people.

"This then is the transaction to which the plaintiff Corporation submits the Central People's Government succeeded after midnight on 5/6th January, 1950, basing this argument on the doctrine of succession.

"The doctrine of succession of one Government to another rather than by title paramount has been recognized by judicial decision (*United States of America v. McRae*, Law Reports 8 Equity; *Republic of Peru v. Dreyfus*, (1888) 38 Ch.D.; and the

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American case of the *Guaranty Trust Company v. United States*, Vol. 304 United States Reports) and most recently in *Bogusławski and Another v. Gdynia Ameryka Linie*, 2 A.E.R. 1950, and the purposes of and the reasons for that doctrine are well established. There must surely be, in my opinion, a limit to the scope of the acts to which this doctrine applies; a limit to the transactions into which a Government, knowing that recognition will shortly be withdrawn from it, may enter.

" This transaction was clearly hostile to the present *de jure* Government of China and I consider hostile to the interests of the Chinese people. Counsel for the plaintiff Corporation did not suggest that the Central People's Government would wish to adopt these contractual rights but submitted that it could not escape from them and that if his proposition depended on its acquiescence then—*cadit quaestio*. Counsel further stated that the plaintiff Corporation would consider itself bound by the terms of the contract and would not directly or indirectly permit the aircraft to be operated in China under the present Government.

" In *Bogusławski v. Gdynia Ameryka Linie*, Denning L.J. lays down the following principles:—

'On such a succession it is obviously desirable that there should be continuity in the administration of the affairs of State, and the law will make every presumption in favour of it. Decrees which were passed by the old Government will remain effective except in so far as the new Government decides to repeal them . . . So also, it seems to me that the offers made by the old Government may be lawfully accepted unless they have meanwhile been revoked. There may be a difficulty in enforcing the ensuing contracts because the new Government cannot be impleaded in our Courts. But the principle of continuity is of paramount importance. It requires that the new Government should stand in the shoes of the old Government in all respects, except in respect of acts of members of the old Government which are *ultra vires*, or acts which were done by them not in good faith as trustees for the State but for an alien and improper purpose. . . .

'Secondly did Mr. Kwapinski make the declaration in good faith or did he do it for an alien or improper purpose? It was argued before us that it was most detrimental to the shipping companies for the men to leave the ships and thus immobilize them; that the payment of three months wages if they left would have the effect of inducing them to leave and was, therefore, unjustifiable; and it was to be inferred that the purpose of the declaration was to embarrass the new Government on its taking over the ships. If that were the purpose of the declaration, I do not think it would be valid. . . .

"In the transaction now before this Court, I have no hesitation in reaching the conclusion that not only was it one designed to embarrass the Central People's Government, but it was against the interests of the Chinese people and that it was a transaction incompatible with that trusteeship which every Government must assume. The loss of these aircraft in a country so large as China and with poor communications would be severe. The majority of the staff and employees had already attorned to the Central People's Government, and the aircraft were only at any time owned by the Nationalist Government solely in its capacity of trustee. I cannot hold that at the time of the transaction the Nationalist Government may properly be said to have sold these aircraft for the purposes of fighting to retain its former territory. In my opinion, this was an act of members of the Nationalist Government done not in good faith as trustees but for an alien and improper purpose.

"To turn to the question of retroactivity, I would again quote Denning L.J. (*Boguslawski v. Gdynia Ameryka Linie*).

'The retroactive effect must, however, be confined to the acts of the Government within its proper sphere, *i.e.* acts with regard to persons and property in the territory over which it exercises effective control; (See *Banco de Bilbao v. Sancha*) or acts with regard to ships which are registered there and whose masters attorn to them; see *The Arantzazu Mendi*. Just as the new Government only gains its right to recognition by its effective control, so also the extent of the retroactivity is limited to the area of its control.

'The relevant period in this case is from June 28, 1945, to midnight of July 5/6, 1945. During that week the Polish Government of National Unity had control only over the territory of Poland itself. It had no control over the men and ships who were subject to the Polish Government in London. During that time, no master of any of those ships attorned to the new Polish Government. It follows therefore that our recognition had no retroactive effect whatever so far as those men and ships were concerned.'

"It was argued for the plaintiff Corporation that since the transaction was one which the Nationalist Government, then recognized *de jure*, had authority to enter into, then on the principle of succession it was one to which retroactivity, by recognition of the new Government as the *de jure* Government, could not affect.

"To my mind, it appears that it is to the acts of the new Government to which the principle would apply and it is necessary to consider those acts.

"The Nationalist Government ceased to be *de facto* Government of different parts of China as from the date on which it

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ceased to be in effective control of those parts and it is to be assumed that the Central People's Government became correspondingly *de facto* Government of those areas. In October 1949, the Central People's Government dismissed the Ministers of the Nationalist Government and new ministers were appointed in their place. In November 1949, the majority of the members of the staff and employees of Central Air Transport Corporation in Hong Kong had attorned to the new Government and these Courts have held that the control and possession of the aircraft in Hong Kong was in the Central People's Government. On November 12, 1949, the Premier of the Central People's Government appointed Cheuk Lin Chen, General Manager of Central Air Transport Corporation (he had been General Manager since the inception of the Corporation) and from November 15, 1949, wages and salaries were paid by the Central People's Government.

" Even though the aircraft were in Hong Kong, there is no doubt that the Central People's Government were in possession and in effective control. If an analogy may be drawn between ships abroad, the masters of which have attorned, and aircraft in similar circumstances, then clearly here is a situation in which recognition *de jure* will have a retroactive effect and, in my opinion, that retroactive effect will go back at least as far as the dismissal of the ministers of the Nationalist Government in October 1949.

" Further, it must be remembered that the aircraft in this case were owned, managed and controlled by the Government of China and that the Central Air Transport Corporation is a department of that Government. I hold therefore that as from October 1, 1949, these aircraft were owned by the Central People's Government.

" With respect to the actual contract itself, it is to be noticed that it purports to sell all the physical assets of Central Air Transport, a department of the Government of China, possessing in addition to the aircraft in Hong Kong property to the value of Hong Kong \$6,000,000 in China and a radio station in Formosa. It is idle to suppose that the assets in China would be affected by this transaction. Further, although the property in the aircraft in Hong Kong might legally pass on the execution of the contract, delivery could not be effected for, under the Municipal law of Hong Kong, for goods which at the time of sale are in the possession of a third party an acknowledgment by that third party is required. The contract was also executory as the promissory notes have not fallen due. It is probable that the Order-in-Council would cure the former and time the latter, but no more effective reprobation of the contract, of which it had knowledge, could have been

made by the Central People's Government than by acquiring possession and control of the aircraft in Hong Kong.

"Holding therefore as I do that this transaction between the then Nationalist Government of China and the partnership General Chennault and Mr. Willauer is not valid or enforceable in these Courts, it follows that the plaintiff Corporation may stand in no better position and I find accordingly that the plaintiff Corporation has failed to establish ownership or right to possession of these aircraft in Hong Kong, the subject-matter of this action. It follows further that I must hold that the ownership and the right to possession of these aircraft is in the Central People's Government."

[Report: *Hong Kong Law Reports*, 35 (1951), p. 22.]

On appeal,

Held (by the Supreme Court, sitting as Court of Appeal): that the appeal must be dismissed for reasons substantially identical with those underlying the judgment of the Court below. The Court said (*per* Gould J.), after citing the facts:

"The essential question is whether the Nationalist Government had as at December 12, 1949, power to and did effectually dispose of and give to the purchasers a good title to the aeroplanes in question. Recognition *de jure* at that date remained with the Nationalist Government but on my reading of the answers to the questionnaire, *de facto* recognition must be deemed to have been extended as at that date to the Central People's Government as regards the areas then under their control. That view is strengthened by the answer to the supplementary question. The Nationalist Government could not therefore effectively dispose of any part of the public domain within those areas; it is well established by authority that during *de facto* recognition the Government so recognized has full rights of ownership and control in its own territory. In *The Arantzazu Mendi*, [1939] A.C. 256 at 265, Lord Atkin said:

'It necessarily implies the ownership and control of property whether for military or civil purposes, including vessels whether warships or merchant ships. In those circumstances it seems to me that the recognition of a Government as possessing all those attributes in a territory while not subordinate to any other Government in that territory is to recognize it as sovereign, and for the purposes of international law as a foreign sovereign State. It does not appear to be material whether the territory over which it exercises sovereign powers is from time to time increased or diminished.'

"In Wheaton's *International Law* (4th ed., p. 48) the writer puts the position as follows:

'Even the lawful sovereign of a country may, or may not,

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by the particular Municipal constitution of the State, have the power of alienating the public domain. The general presumption, in mere internal transactions with his own subjects, is, that he is not so authorized. But in the case of international transactions, where foreigners and foreign Governments are concerned, the authority is presumed to exist, and may be inferred from the general treaty-making power, unless there be some express limitation in the fundamental laws of the State. So, also, where foreign Governments and their subjects treat with the actual head of the State, or the Government *de facto* recognized by the acquiescence of the nation, for the acquisition of any portion of the public domain or of private confiscated property, the acts of such Government must, on principle, be considered valid by the lawful sovereign on his restoration, although they were the acts of him who is considered by the restored sovereign as an usurper. On the other hand, it seems that such alienations of public or private property to the subjects of the State, may be annulled or confirmed, as to their internal effects, at the will of the restored legitimate sovereign, guided by such motives of policy as may influence his counsels, reserving the legal rights of *bonae fidei* purchasers under such alienation to be indemnified for ameliorations.'

" This presumption in favour of the validity of an alienation of part of the public domain to a foreigner must be read, I think it is obvious, where there are *de jure* and *de facto* Governments in conflict and in control of different areas, with reference only to the portion of the public domain in the area of the Government responsible for the alienation in question. As regards publicly owned moveable property which either Government thinks fit to take from its own to neutral territory during the continuance of recognition, there can be no reason to suppose that it thereby loses any power to alienate which it previously had. I leave aside for the moment any special considerations which may be thought to attach to ships and aeroplanes by reason of their peculiar character.

" The aeroplanes the subject matter of these proceedings (being civil commercial aircraft and not war-planes) had been sent to Hong Kong by the Nationalist Government in its retreat. As a belligerent Government it was entitled to take steps to preserve for its own benefit, and to remove from possibility of capture, such important assets. Up to a date in November 1949, the aeroplanes remained in the possession of the Nationalist Government, but then against the will of that Government certain of its employees claimed to hold the aeroplanes for the Central People's Government, and obtained effective physical control of them, despite the efforts to the contrary of those acting on behalf of the Nationalist Government. The Central People's Government having adopted the actions of those holding physical control, there was a

sufficient claim of possession to invoke the doctrine of sovereign immunity. But with that doctrine the Court has now no concern and it is necessary to decide whether physical control so obtained is effective to antedate the title of the Central People's Government to the assets in question, to the commencement of that control. In the judgment appealed from, the learned Chief Justice held that the doctrine of retroactivity did, by virtue of that control, operate so as to render of no effect, the acts of the Nationalist Government relating to the aeroplanes.

"The ordinary rule as to the retroactive effect of *de jure* recognition is expressed by Denning L.J. in *Bogustawski v. Gdynia-Ameryka Linie*, [1951] 1 K.B. 162 at 181:

'In the ordinary way of course, our Courts do give retroactive effect to the recognition of a Government, in that we recognize the acts of that Government within its proper sphere to have been lawful, not merely from the time of recognition, but antecedently, from the time that it was an effective Government. Thus, if it has already made decrees transferring to itself goods and chattels within its territory and sold them to British buyers, our Courts will recognize the transfer as valid: *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* If it has already passed legislation dissolving companies incorporated within its territory, our Courts will hold the companies to be non-existent as well here as there: *Lazard Bros. & Co. v. Midland Bank, Ltd.* The reason for this retroactivity is that, just as we recognize the decrees of the Government subsequent to recognition to have been lawful, so also we must recognize the prior decrees to be lawful, unless, indeed, we are to say that the Government must re-enact those prior decrees all over again before they can have any validity in our eyes. That would be a work of supererogation and humiliation to which that Government might reasonably object, and it would be inconsistent with the sovereignty which is involved in recognition.'

"Then follows this qualification:—

'The retroactive effect must, however, be confined to acts of the Government within its proper sphere, that is to say, acts with regard to persons and property in the territory over which it exercised effective control: *Banco de Bilbao v. Sancha*; or acts with regard to ships which are registered there and whose masters attorn to it: *Government of the Republic of Spain v. S.S. "Arantzazu Mendi"*. Just as the new Government only gains its right to recognition by its effective control, so also the extent of the retroactivity is limited to the area of its effective control.'

"There is, I think, no act of the Central People's Government affecting persons and property in its own territory which has any bearing on the question. The purported dismissal

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on October 1st 1949 of the ministers of the Nationalist Government which has been frequently referred to, can only be deemed effective within the territory and as regards assets from time to time in the control of the People's Government. Elsewhere and so long as the Nationalist Government retained *de jure* recognition, such a decree could have no effect. The only 'act' of the Central People's Government with direct reference to the aeroplanes was a declaration signed by Mr. Chow En-Lai that CATC was the property of that Government, a declaration which could not of itself possibly have the legal result of divesting any title of the Nationalist Government to the property in question, but was no more than an acceptance and adoption of the acts of those who claimed control on behalf of the Central People's Government. These acts have been referred to as an 'attornment' to the People's Government and while that is a possible description I think there is not very great similarity between the position of those attorning and that of the master and crew of a ship. I doubt whether either possession or custody of the aircraft could be said to be in Mr. Chen Cheuk Lin as Chairman of the Board of Governors (and replaced by the Nationalist Government, according to evidence adduced before the Full Court, by Mr. Ango Tai on November 12 1949 while the question of physical control remained unsettled) and there is no evidence that the Board of Governors attorned as a body. Those who finally ended up in actual control were a majority of the employees including Mr. Chen and a number of the other senior officials. I see no point however in going further into this matter as I think there is no essential difference in principle between an attornment in the strict sense and a mere forcible taking of possession. As against those who were up to that moment rightly in possession, both are wrongful acts. A bailee cannot by attorning to a third person against the will of his bailor deprive the bailor of any title which he may have to the goods in question. If he is the true owner his rights are not affected. If the persons attorning in the present case had the custody of the aeroplanes they had it by virtue of their employment by the Nationalist Government. Their exclusion of their employers from possession must therefore be a breach of municipal law. If, on a wider view, the actions of the persons concerned might possibly be regarded, in view of the adoption of those acts by the Central People's Government, as acts either of civil war or of sovereignty, they cannot be regarded as being in accordance with international law. No Government may carry on its civil war in neutral territory and as Denning L.J. said in the *Bogusławski* case (*supra*) at p. 180 referring to the Polish Government in exile—'No such remedies could have been

exercised in England except by the permission of our Government. No other Government can exercise acts of sovereignty here except with our consent.' In the '*Christina*', [1938] A.C. 485, it was held that it was unnecessary to consider by what mode possession was obtained; but that was in relation to a claim of sovereign immunity arising from the independent status in international law of the foreign sovereign. In the present case no such question can be considered, and the Court must make a declaration of legal rights. If those rights are dependent to any extent on possession of the subject matter of the dispute, I think that acquisition of possession by a wrongful act, cannot confer upon the party so acquiring it, any benefit which he did not previously enjoy. In other words the question must be settled with reference to the right to possession. In Lauterpacht's '*Recognition in International Law*' (1948) the application of the principle '*ex injuria jus non oritur*' to international law is dealt with on pp. 420-426. It is subject to exceptions but the following general statement—(from pp. 420-1)—seems to me to be applicable in the present circumstances:—

'The principle *ex injuria jus non oritur* is one of the fundamental maxims of jurisprudence. An illegality cannot, as a rule, become a source of legal right to the wrongdoer. This does not mean that it cannot produce any legal results at all. For it gives rise to a legal liability of the law-breakers; it may become, in the interests of intercourse and general security, a source of rights for third persons acting in good faith; it may, temporarily and provisionally, confer upon the wrongdoer a measure of protection of his possession; it may, if the rigid conditions of lapse of time and of other requirements have been complied with, crystallize into a legal right as the result of the operation of prescription. But to admit that, apart from well-defined exceptions, an unlawful act, or its immediate consequences, may become *suo vigore* a source of legal right for the wrongdoer is to introduce into the legal system a contradiction which cannot be solved except by a denial of its legal character. International law does not and cannot form an exception to that imperative alternative.'

"A passage in the judgment of Hill J. in *The Jupiter* (No. 3), [1927] P.D. 122 at 135-6 appears to be particularly apt in the present circumstances. One Lepine the captain of the vessel had allowed representatives of the U.S.S.R. to take possession of it. After holding that the captain had custody only of the vessel and that the right to possession was in Mr. Bourgeois, an administrator appointed by a French Court, Hill J. said:—

'The result of these considerations is that in March, 1924, when Lepine allowed the U.S.S.R. to take possession of the

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ship, M. Bourgeois was in actual possession and had the right to possession. Lepine may have acted as a loyal subject of the U.S.S.R., but he betrayed his trust to his employers. *Prima facie* the act of Lepine was wrongful. *Prima facie* M. Bourgeois, who had possession in fact and law, was wrongfully deprived of possession in fact. *Prima facie* M. Bourgeois is entitled to recover possession. His right does not depend merely upon a right to sue given by the French decrees. It depends upon possession, and right to possession, in England, and wrongful dispossession in England, and the ship is under the arrest of this Court. If M. Bourgeois had possession, and the right to possession, here, and was dispossessed here, there can be no question as to his right to sue here. Judgment must be pronounced in his favour, unless the Cantiere Olivo Societa Anonima can show that the U.S.S.R., who sold the ship to them, had a superior title. It is upon the title of the U.S.S.R. that the Cantiere defend.'

" Similarly here, I think that only if the Central People's Government had a right to possession superior to that of the Nationalist Government could they rely upon the control actually obtained on their behalf, as giving them exclusive jurisdiction over the aeroplanes. If the latter are to be regarded as ordinary chattels there can be, in my opinion, no question of any such superior right. As I have already said I think that the Nationalist Government as a belligerent and *de jure* Government was entitled to maintain its original, unchallengeable rightful possession and control.

" If, putting it at the highest, the aeroplanes are to be regarded as being in the same position as a ship registered in territory occupied by the Central People's Government, the matter presents greater difficulty. The question is one of the right to possession of state-owned property. Perhaps the closest analogy is to be found in the cases where there have been competing requisitioning decrees by the *de facto* and *de jure* Governments in respect of ships, but I know of no such case which has been decided on the merits. The doctrine of sovereign immunity has proved the deciding factor and obviated the necessity for consideration of anything further. That was the case in the '*Arantzazu Mendi*' (*supra*); in the '*Christina*' (*supra*) the extent to which the vessel in territorial waters remained subject to the law of the flag was similarly not considered. Whatever the importance that might attach to the port of registry if the vessel were in the possession of a third party in the position of a stake-holder, I do not think that it has ever been suggested that any such consideration could over-ride the belligerent rights of a Government rightly in possession of the vessel. It would be an absurdity if one recognized belligerent could by decree wrest property from

another in neutral territory, and no neutral Court could in my opinion give it any effect, in the unlikely event of its being called upon to adjudicate upon the merits. In any event, there is no complete analogy between ships and aircraft. They differ in many ways including the matter of registration; that of ships is in a particular port whereas the registration of aircraft is national. The opinion expressed in *Shawcross and Beaumont on Air Law* (2nd ed. at p. 14) is that (subject to the influence of statute law in particular cases) aircraft are *sui generis*.

“ My opinion therefore upon this aspect of the case is that the Central People’s Government could not show any superior title or right to possession: nor can it rely upon any rights arising out of actual possession acquired in the way it was; therefore it had no possession which could bring into effect the doctrine of retroactivity. That doctrine I think relates to the acts of a Government which has already acquired jurisdiction through possession and cannot include the actual act of taking possession if that act be wrongful. On this point I hold therefore that the ordinary principle of continuity was not displaced by any consideration of retroactivity and that it follows that the Nationalist Government was entitled to possession of and had jurisdiction over the aeroplanes.

“ In arriving at this conclusion I have accepted that the principle of retroactivity applies only to the acts of a Government relating to persons and property within its effective control. This seems to be the effect of all the leading authorities from *Luther v. James Sagor & Co.* (1921) 3 K.B. 532 to *Bogusławski v. Gdynia-Ameryka Linie* (*supra*) with the possible exception of the case of *Haile Selassie v. Cable & Wireless* (No. 2) 1939 Ch.D. 182 which contains the only hint that title to a right in neutral territory might be included. In the Court below Bennett J. had, in that case, held that the principle of succession as expressed in *U.S.A. v. McRae*, L.R., 8 Eq. 69 did not operate so as to divest a *de jure* sovereign of a right to sue for a public debt recoverable in England, in favour of a usurping Government recognized *de facto*. The learned judge gave weight to a passage from the judgment of Lord Cairns in *U.S.A. v. Wagner*, L.R., 2 Ch. 582, at p. 593, the important portion of which is as follows:

‘ This argument, in my opinion, is founded on a fallacy. The sovereign, in a monarchical form of Government, may, as between himself and his subjects, be a trustee for the latter, more or less limited in his powers over the property which he seeks to recover. But in the Courts of Her Majesty, as in diplomatic intercourse with the Government of Her Majesty, it is the sovereign, and not the state, or the subjects of the sovereign,

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that is recognized. From him, and as representing him individually, and not his state or kingdom, is an ambassador received. In him individually, and not in a representative capacity, is the public property assumed by all other states, and by the Courts of other states, to be vested. In a republic, on the other hand, the sovereign power, and with it the public property, is held to remain and to reside in the state itself, and not in any officer of the state. It is from the state that an ambassador is accredited, and it is with the state that the diplomatic intercourse is conducted.'

"Upon this Bennett J. rested his decision, though it is not entirely clear whether he would have been of a different opinion if the plaintiff had been an exiled *de jure* Government of a republic. Before the appeal was heard, His Majesty's Government had recognized the King of Italy as Emperor of Abyssinia, and counsel conceded that the appeal must therefore be allowed and the action dismissed. At page 197 of the report the Master of the Rolls said:

'It is not disputed that in the Courts of this country His Majesty the King of Italy as Emperor of Abyssinia is entitled by succession to the public property of the State of Abyssinia, and the late Emperor of Abyssinia's title thereto is no longer recognized as existent. Further, it is not disputed that that right of succession is to be dated back at any rate to the date when the *de facto* recognition, recognition of the King of Italy as the *de facto* Sovereign of Abyssinia, took place. That was in December, 1936. Accordingly the appeal comes before us upon a footing quite different to that upon which the action stood when it was before Bennett J. We now have the position that in the eye of the law of this country the right to sue in respect of what was held by Bennett J. to be (and no dispute is raised with regard to it) part of the public State property, must be treated in the Courts of this country as having become vested in His Majesty the King of Italy as from a date, at the latest, in December, 1936, that is to say, before the date of the issue of the writ in this action. Now that being so, the title of the plaintiff to sue is necessarily displaced.'

"In my respectful opinion this passage takes the matter further than was necessary for the decision of the point at issue. Appeal being by way of rehearing, it would surely be enough to dispose of the matter if the plaintiff were deprived of his right to sue at any time before the litigation was finally disposed of. I do not think in any event that it was intended to hold that in all cases recognition of a Government as the *de jure* Government would antedate to the date of its *de facto* recognition title to the whole of the public domain. How would that principle work in cases like the present where *de facto* recognition was extended gradually to the different areas occupied? To what date would the antedating of title

go if it is not to be determined by effective control? Assuming that Bennett J.'s decision had been upheld on appeal by the highest tribunal prior to *de jure* recognition of the King of Italy, and the claim paid, can it be supposed that after *de jure* recognition Cable & Wireless would have had to pay again on the ground that they had paid someone who had no title to sue? That would be contrary to the principle of convenience as expressed in the passage from the judgment in *Guaranty Trust Co. v. U.S.* (304 U.S. at 140) quoted with approval by Cohen L.J. in the *Bogustawski* case (*supra*) at p. 176. It is noteworthy that in the last mentioned case Cohen L.J. interjected during the argument (at p. 171 of the report):

‘ If during the period from June 28 to July 5-6 midnight, an Englishman paid in England a debt due to the Polish State to the proper officer of the London Polish Government and obtained from him a proper discharge, would not an action against the Englishman in the English Courts at the instance of the new Polish Government for the debt fail? ’

“ The Court of appeal in that case did not apparently feel that any difficulty in coming to its decision on retroactivity arose out of *Haile Selassie v. Cable & Wireless, Ltd.* Each case must be considered with regard to its own facts, and I do not think it is correct to read into the Haile Selassie decision an intention to differ from the oft repeated view that a new Government in the ordinary way does not take the public property of the Government which it follows by title paramount.

“ A further ground upon which the learned Chief Justice based his dismissal of the action, and which it is now necessary to consider, had relation to the nature of the transaction upon which the appellants relied for their alleged acquisition of title. It is an established rule, and one to which I have already referred, that any Government which succeeds another, succeeds to all the public property of the displaced power, but it succeeds by representation and not by title paramount. Therefore it succeeds subject to any correlative rights and obligations by which the displaced Government would have been bound. The rule as stated in *United States of America v. McRae* (*supra*) is subject to an exception which need not be mentioned here. Upon this rule the appellants submitted that the Central People's Government succeeded the Nationalist Government by representation as at the date of *de jure* recognition and acquired the rights of the latter under the contract of sale. It follows of course that the Central People's Government could not acquire such rights without accepting any outstanding liabilities. As to this doctrine the learned Chief Justice said:—

‘ There must surely be, in my opinion, a limit to the scope

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of the acts to which this doctrine applies; a limit to the transactions into which a Government, knowing that recognition will shortly be withdrawn from it, may enter.'

"He based this opinion upon a passage from the judgment of Denning L.J. in *Boguslawski v. Gdynia-Ameryka Linie* at pp. 182-3^[1] . . .

"Mr. D'Almada contended that the Court could not enquire into the acts of a sovereign Government then accorded *de jure* recognition. In an ordinary case the Court would be relieved of that enquiry by the operation of the doctrine of sovereign immunity: as Lord Atkin said in *The Arantzazu Mendi* (p. 265):

'The non-belligerent state which recognizes two Governments, one *de jure* and one *de facto*, will not allow them to transfer their quarrels to the area of the jurisdiction of its municipal Courts.'

"That is the position we have here with the bar of sovereign immunity removed. The Central People's Government was at the time of the transaction in question equally to be regarded as a sovereign Government in respect of the very large area it occupied—almost the whole of China. The property with which the action is concerned was public property of the state of China and the Court is charged with the duty of determining its ownership. As I see it, the only way in which that duty can be discharged is by the application to the facts of the case of the principles of international law as recognized and applied in British Courts. But for the sale relied upon by the appellants, the Central People's Government would now, in the view of those Courts, undoubtedly be the owner of the property by succession as trustee, of course, for the state. If the validity of the sale can be impugned on the ground that it was a breach of international law, that is a matter that the Court must enquire into in order to determine the ownership. The appellants themselves rely on the wrongful nature of the possession of the Central People's Government as negating the operation of the doctrine of retroactivity, and as I have said, that Government must also be regarded as a sovereign Government. There is no hint in the judgment of Denning L.J. in the *Boguslawski* case that he regarded himself as precluded from deciding whether Mr. Kwapinski (acting for the *de jure* Government) acted for an alien and improper purpose. He did in fact consider that question, and decided that he had not.

"Before proceeding to consideration of the facts of this case I will set out a passage from Lauterpacht's *Recognition in International Law* at p. 93:—

¹ This passage is reproduced above, at p. 90.

‘ Although international law does not stigmatize revolutions as unlawful, it does not ignore altogether the distinction between the revolutionary forces and the established Government. So long as the revolution has not been fully successful, and so long as the lawful Government, however adversely affected by the fortunes of the civil war, remains within national territory and asserts its authority, it is presumed to represent the State as a whole.’

“ Then as a footnote:—

‘ Thus, for instance, during the Spanish Civil War of 1936–9 the lawful Government, deprived of the major part of national territory, continued to represent Spain in the Council and the Assembly of the League of Nations and before the Permanent Court of International Justice. See the Judgment of November 6, 1937, in the *Borchgrave* case between Belgium and Spain (*P.C.I.J.* Series A/B, no. 72). But, as in other matters, so also in this case good faith prescribes limits to the operation of a general rule. Thus it is doubtful whether political or commercial treaties of a far-reaching character may properly be concluded with a Government thus situated. There is force in the contention that, notwithstanding the general rule as to the continuity of the State, the successful revolutionary Government would not be bound by such treaties concluded *durante bello* as being *in fraudem* of the general interests of the nation. When in 1858 and 1859 the United States recognized the Constitutionalist Government of Juárez in Mexico, while refusing recognition to the insurrectionist Miramón Government established in the capital, they were negotiating—and eventually concluded—important political treaties of alliance and of cession with the Constitutionalist Government. This they did notwithstanding the grave doubts entertained in the matter by the United States Minister to Mexico. He said: “ The cession of territory is the gravest and the most important act of sovereignty that a Government can perform; it is therefore questionable whether it should be performed at a moment when it is in conflict with another Government for the possession of the empire, even though it may be *de jure* and *de facto* much more entitled to respect than that with which it is struggling in civil war, and this consideration is as important to the party purchasing as to the party ceding the territory ” . . . ’

“ The type of case dealt with in this footnote is I think akin to the acts done ‘ not in good faith as trustees for the State ’ referred to in the passage from Denning L.J.’s judgment quoted above. In dealing with this passage Mr. D’Almada submitted that in the first place the cession of territory was an act of such fundamental importance to a State that it occupied a special position—there was a difference in kind. He said further that here we do not have a far-reaching commercial treaty but a mere sale of state-owned personal property.

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He quoted, to point the importance of territory, from Lauterpacht (at p. 30):—

‘The possession of territory is, notwithstanding some theoretical controversy which has gathered round the subject, a regular requirement of statehood. Without it there can be no stable and effective government.’

“It is obvious of course, that questions of territory are fundamental, though even in such a matter there can be wide variations in degree. I do not however agree that the principle should be limited thereto; there are many other matters of higher importance. If a Government about to go out of power gave an oil concession to a foreign country or foreign nationals in consideration of a lump sum of money, I would say it was in the same category. A sale of the British Navy, or Merchant Navy, would be a matter of vital concern to the state—and would not be completely dissimilar to what is here under consideration. I am not impressed by the argument that we are in this action concerned only with deliverable chattels—the subject matter of the alleged sale was the whole assets of two major airlines, of inestimable value in a country like China.

“On the facts, the learned Chief Justice found that the sale was a device to prevent the aircraft falling into the hands of the Central People’s Government on its recognition *de jure*. The following passage in his judgment was strongly criticized by counsel:

‘By normal diplomatic usage, and indeed to be inferred from the terms of the contract quoted above, the then Nationalist Government must have been fully alive to the probability of the withdrawal of recognition by His Majesty’s Government in the near future and in fact this took place as from midnight January 5/6, 1950, and it is evident that this transaction was a device entered into with full knowledge by both parties, by which it was hoped that the aircraft might be prevented from passing to the Central People’s Government on its recognition *de jure* for the references to “Communist Areas of China” must relate to the areas controlled by that Government, recognized as the *de facto* Government of those areas.’

“The ground of criticism was that the learned Chief Justice was here examining events and the value of evidence in the light of after events. I am not inclined to agree. I am not conversant with ‘normal diplomatic usage’ and am not therefore aware whether this would entail notification of the intention to withdraw recognition some four weeks before the event. But however that may be, what is quite clear is that by December 12, 1949, the Nationalist Government had lost all but a very small portion of the Chinese mainland, and it is

to my mind an inescapable inference that it knew that it was about to lose the remainder. That inference arises from two considerations. Firstly, the Nationalist Government itself had moved to Formosa; it had already moved to Canton, thence to Chungking and thence to Chengtu. It is not to be supposed that it would leave Chinese territory proper while it retained any hope of successfully defending any portion of it. Secondly, recognition by His Majesty was withdrawn some twenty-four days afterwards. The state of affairs which led to that withdrawal cannot but have been amply apparent to the Nationalist Government on December 12. Such a step is not taken lightly or without lengthy deliberation. The implications are set out in Lauterpacht—at p. 94:—

‘ In one respect, however, the presumption in favour of the lawful Government is above controversy: the latter is entitled to continued recognition *de jure* so long as the civil war, whatever its prospects, is in progress. So long as the lawful Government offers resistance which is not ostensibly hopeless or purely nominal, the *de jure* recognition of the revolutionary party as a Government constitutes premature recognition which the lawful Government is entitled to regard as an act of intervention contrary to international law. For such recognition amounts to recognizing the rebels either as the Government of the entire State or as the Government of a new State. An authority cannot be recognized, *de jure*, as a Government without being recognized as the Government of a State. In either case recognition of the revolutionary party as a *de jure* Government constitutes a drastic interference with the independence of the State concerned. The illegality of such action is so generally admitted that, as in the corresponding case of recognition of States, even those who adhere to the political view of recognition admit that at least this particular aspect of it is governed by international law. Premature recognition is a tortious act against the lawful Government; it is a breach of international law.’

“ It is not for the Court to suggest that this recognition was premature (even though other states have not yet extended recognition) and a state of affairs which induced His Majesty’s Government to believe that by January 5 resistance by the Nationalist Government was ‘ostensibly hopeless or purely nominal’ must have been amply evident to the Nationalist Government on December 12. If that is so (and I do not think this is an *ex post facto* view) the Nationalist Government must have been aware that, putting it at the lowest, transfer of *de jure* recognition was not improbable.

“ It is next necessary to examine the contract of sale itself. The property affected was ‘all of the physical assets and such stock as is owned by the Government of the said CATC and CNAC’. That means in the case of CATC the whole of its

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assets. Paragraph C of the contract indicates that the purchasers as well as the vendor were aware that the assets were already being claimed by the Central People's Government as they were already subject to various injunctions issued by the Supreme Court of this Colony. Paragraph 4 in which the purchasers agree to do everything in their power to reduce the assets to their possession and absolute control and paragraph 5 in which the vendor agrees to assist them to do so are a further indication to the same effect. The total purchase price was U.S. \$3,500,000 payable by the issue by the purchasers of six promissory notes, payable to bearer without interest, all, by paragraphs 2 (a) & (b) 'subject to the terms and conditions set forth in the form of note attached to this letter'. A further obligation of the purchasers was to organize a corporation or corporations in such country as they might select, to transfer the assets thereto, and to obtain bearer promissory notes from the corporations in substitution for those issued by the purchasers. The substitute promissory notes were to be subject to the same terms and conditions as the originals 'excepting only that such corporation notes shall not be limited to payment out of the said physical assets of CATC and CNAC but shall be fully payable out of the assets of any nature belonging to the Corporation'. It seems clear from this that the purchasers' liability under their notes was to be limited. If they failed to get control of the assets purchased they were under no liability. It was stated by Sir Walter Monckton in the Court below that in fact the only notes signed and delivered were those signed by the corporation—the present appellant. These were not subject to conditions but would of course in any event be payable only out of the assets of the corporation. Then follows an interesting provision. The promissory notes at the option of the holder are to be convertible into stock in the corporation provided that the holder is deemed by the purchasers to be anti-Communist and to be the authorized representative of the Nationalist Government or its designees. The purchasers also agreed that the assets should not be used for the benefit of Communist China directly or indirectly.

"This contract was held by the learned Chief Justice to be hostile to the present *de jure* Government and to the interests of the Chinese people; a breach of trusteeship and done for an alien and improper purpose. With this finding I am in full agreement, for reasons which I will now enumerate. Firstly, as I have said, the contract was entered into at a time at which the Nationalist Government must have known at the very least that withdrawal of recognition was not improbable. The state of affairs would also no doubt be known to the purchasers

by virtue of their close association with China referred to in paragraph F of the contract. Secondly, it was entered into at a time when to the knowledge of all parties the assets in question had already been claimed by the Central People's Government and were under Court control. The Central People's Government at the time was in occupation of almost the whole of China and the assets were peculiarly associated with that territory. With regard to that association, it is interesting to note the opinion of Beale that a state has jurisdiction over a chattel if it is habitually kept within the state but is temporarily outside it; and of Martin Wolff that to all means of transport is to be attributed some fixed resting place, in which they are as it were resident, even if temporarily absent. (Both of these I have taken from McNair's 'Legal effects of War' (3rd ed.) at p. 446). These are considerations which might well give pause to a purchaser, though it would appear that the immediate purchasers here took no risk under the original contract. Thirdly, the nature of the contract was such that it not only sought to deprive the Central People's Government and the Chinese people within its jurisdiction of the aeroplanes, but also was at pains to ensure that no possible benefit could accrue to that Government if it, as successor, became entitled to the benefit of the contract. The first of these objects is legitimate, so long as the Nationalist Government retained *de jure* recognition: but the prohibition of the use of the aircraft for the benefit of Communist China was of course unlimited. As to the second point, in the inconceivable event of the Central People's Government seeking to approbate and enforce the contract, it would be met by a plea that the promissory notes were to bearer and were negotiable—they would no doubt by then have been negotiated. There would be a further plea that the contract included the whole of the assets of CATC some of which (a proportion described as 'less than ten per cent.') were in China itself. Though at the time of the contract the Nationalist Government had definitely no jurisdiction to sell these particular assets, the Central People's Government could not approbate a part only of the contract; it was an entire contract and these assets would have to be delivered. If the Central People's Government in fact obtained possession of the promissory notes and sought to become holders of stock in the appellant corporation it would be met by paragraph 3 (q) which denies such a privilege to anyone not anti-Communist. Fourthly, the provision last referred to provided the means whereby the Nationalist Government, while parting with title to the assets could acquire a major share in the stock of the holding corporation. This it could conceal, if desired, by the employment of a nominee. That such an interest would probably

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be a controlling one is indicated by the *proviso* that the purchasers should have first obtained a satisfactory management agreement with the corporation. From this point of view, the contract provided a cloak to conceal a large measure of continued beneficial ownership. It is no answer to say that the option has not been exercised; it is the contract which is under examination. The result of the latter, if valid, is that the Chinese people, who had previously a commercial public asset of immense value to their country, have that asset no longer; neither would their legally recognized Government be able to secure by succession any *quid pro quo*, but the benefit of the transaction still rests with persons no longer recognized as being trustees for the State. It appears that this position was arrived at deliberately, with the full knowledge of all parties, and therefore in my opinion, the transaction cannot stand as against the claim of the *de jure* Government.

"I have already dealt with two of Mr. D'Almada's arguments on this phase of the case. A further submission was that the Nationalist Government did no more than it was entitled to do as a belligerent Government then retaining recognition. It was entitled to fight back and in this way differed from the London Government in the *Bogustawski* case. The sale was consistent, he said, with the object of providing funds for the struggle, and equally with the object of putting the aeroplanes out of reach of its opponents. As to the provision of funds, this can hardly have been the object when all that was received was a series of promissory notes maturing at intervals of one year from the transaction. It is to be noted that there was no provision in the contract requiring the planes to be retained and operated from Formosa for the benefit of the vendors' war effort. The argument that they were entitled to put the planes out of reach of the Central People's Government is an attractive one, but I think it does not prevail in view of the fact that the contract was to my mind obviously designed to off-set the consequences of a possible withdrawal of recognition.

"I come to my decision on this part of the case with hesitation, not because of any doubt on the facts, but because of the paucity of legal authority. I have particularly in mind the following passage from the judgment in *West Rand Central Gold Mining Company v. Rex*, [1905] 2 K.B. at 401, which points the difficulties in the ascertainment of international law: . . . "

After quoting from the above case, the learned Judge proceeded as follows: "The principle, however, is stated with confidence by Denning L.J. in the *Bogustawski* case and seems to be allied to municipal law as to following property in respect of which a breach of trust has been committed, and to be in

accordance with common sense. To what degree convenience permits the application of the principle is where difficulty arises, but in the present case I do not think the purchasers could complain of any lack of knowledge of the exact state of affairs at the date of their contract.

"For the foregoing reasons my view on the whole case is that, because of the quality of the possession and control of the aeroplanes exercised on behalf of the Central People's Government the doctrine of retroactivity did not operate so as to vest in that Government jurisdiction over them prior to the date of *de jure* recognition; nevertheless the transaction of December 12, 1949 did not, by reason of its nature and the surrounding circumstances, vest in the purchasers a good title to the property in question as against the Central People's Government, which therefore became entitled thereto as state property, upon *de jure* recognition. In my opinion the appeal must therefore be dismissed."

Scholes J. said: "I agree that the appeal should be dismissed for the reasons given by the President in the judgment which he has just delivered; and I also agree that the additional evidence adduced before the Full Court by the appellants should be admitted in evidence in the special circumstances of this case for the reasons given by the President. However, I should like to add a few words on the question of retroactivity in this case, because I have doubts as to whether or not the appeal should not also be dismissed on that ground. Denning L.J., in *Boguslawski and Another v. Gdynia-Ameryka Linie*, 2 A.E.R. 1950, said this about retroactivity. . . .¹

"I think it rather appears from that, that if the masters of the ships had attorned to the new Polish Government and had the new Polish Government been in effective control of the ships in England between June 28, 1945, and midnight on July 5/6, 1945, which would have been somewhat similar to the position of the aircraft in this case, that Denning L.J. may have been of the opinion that retroactivity would have applied.

"The Master of the Rolls, in *Haile Selassie v. Cable & Wireless Limited* (No. 2), [1939] Ch.D. 182, said this:—

'It is not disputed that in the Courts of this country His Majesty the King of Italy as Emperor of Abyssinia is entitled by succession to the public property of the State of Abyssinia, and the late Emperor of Abyssinia's title thereto is no longer recognized as existent. Further, it is not disputed that that right of succession is to be dated back at any rate to the date when the *de facto* recognition, recognition of the King of Italy as the *de facto* Sovereign of Abyssinia, took place. That was

¹ The relevant passage will be found *supra*, at p. 95.

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in December, 1936. Accordingly the appeal comes before us upon a footing quite different to that upon which the action stood when it was before Bennett J. We now have the position that in the eye of the law of this country the right to sue in respect of what was held by Bennett J. to be (and no dispute is raised with regard to it) part of the public State property, must be treated in the Courts of this country as having become vested in His Majesty the King of Italy as from a date, at the latest, in December, 1936, that is to say, before the date of the issue of the writ in this action. Now that being so, the title of the plaintiff to sue is necessarily displaced.'

"At the relevant date, December 12, 1949, the Central People's Government was in actual possession and in effective control of public property of the State of China, the aircraft in question in this case, although the aircraft were not in their own territory but in that of a non-belligerent country. It appears to me that the Central People's Government was in actual possession and in effective control of the aircraft while they were still registered in China. The Nationalist Government purported to suspend the certificates of registration of the aircraft on November 13, 1949, and at that time the Central People's Government was in control of most of China. It was not until December 12, 1949, that the certificates of registration purported to be cancelled by the Nationalist Government. Article 17 of the Chicago Convention on International Aviation, 1944, states 'Aircraft have the nationality of the State in which they are registered'. If the Central People's Government succeeded to the aircraft retroactively, or if they succeeded to them by succession on gaining effective control of them, then the aircraft vested in the Central People's Government by succession before December 12, 1949, and in that case their possession at that date would not have been wrongful."

[Report: *Kong Hong Law Reports*, 35 (1951), p. 162.]

On further appeal,

Held (by the Judicial Committee of the Privy Council): that the appeal must be allowed. The question of motive in effecting the transaction of sale was irrelevant. It was not possible to accept the view of the Courts of Hong Kong that the transaction was a mere device. It did not lie with British Courts to pronounce on the question whether a recognized foreign Government was or was not acting in the interests of its people. The principle of retroactivity of recognition validates retrospectively acts of the recognized Government; it does not invalidate the acts of the authority previously recognized. The Committee said (*per* Viscount Simon):

“With great respect to Sir Gerald Howe, C.J., their Lordships are unable to accept this view of the facts and the inferences drawn from them as leading to the conclusions stated, or to regard them as justifying a denial of the appellant’s title. For the purpose of judging the correctness of this first ground (the second ground will be considered later) the validity of the transaction must be judged as at the date when it was entered into, and not in the light of subsequent events, which might have turned out differently. On December 12, 1949, the Nationalist Government was the *de jure* Government of China, of which CATC was an organ, and, therefore, the property in these aeroplanes was in the Nationalist Government. The machines had been moved to Hong Kong two months before and it was open to their owners to sell them, and thereby to pass the property in them to the purchasers. No doubt, the motive for making the actual sale was to secure that, if they were flown to an area where the Communists were able to capture them, they should not be added to Communist resources, and the conditions of the contract make this abundantly clear. The Nationalist Government was in retreat and was by this time all but driven out of China, but it was still resisting its opponents and, in their Lordships’ view, the impeached sale was no more ‘a device’ adopted for an ‘alien and improper purpose’ than would have been the blowing-up of a store of ammunition in an arsenal in China from which Nationalist forces were on the point of being driven out. Whether the Nationalist Government on December 12, 1950, were ‘alive to the probability of the withdrawal of recognition by His Majesty’s Government in the near future’ is, at best, a matter of speculation. Other foreign Governments did not take this course and there is no evidence of any warning by His Majesty’s Government in the United Kingdom that it was likely shortly so to act. The reference to ‘normal diplomatic usage’ presumably points to the undoubted fact that, by international law, an established and recognized Government may be so completely overthrown by insurgent forces which claim to supplant it that the recognition hitherto afforded to it by foreign countries may properly be withdrawn—but when and by whom only the future can show. A Government’s policy in buying or selling chattels which it owns is not subject to the review of foreign tribunals and whether its action in this regard is against the interests of those whom it is supposed to serve is a political question. British Courts cannot take it on themselves to pronounce whether a foreign Government, recognized by Her Majesty’s Government, is acting contrary to the interests of its people, and a Government is certainly not a trustee in these matters in any legal sense. The right in

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municipal law to follow property which is subject to a trust into the hands of third parties cannot have any application here.

"It appears to their Lordships that the view under this head adopted by the trial Judge, and by the Full Court, really is that on December 12, 1949, the Nationalist Government knew that it was on the point of being succeeded by a Communist Government, which would be recognized as the *de jure* Government of China, and that without any regard to public interests or to any injury it was doing to the Chinese people, it got rid of these aeroplanes out of spite, merely to embarrass its inevitable successor. Such a view involves assumptions which their Lordships are not prepared to make. The trial Judge claimed to found himself on a sentence in the judgment of Denning L.J. ([1950] 2 All E.R. 373) in *Bogustawski v. Gdynia Ameryka Linie*. That sentence was not necessary to the actual decision, and it was the decision which was confirmed by the House of Lords. The sentence occurs in a passage where Denning L.J. was emphasizing the paramount importance of the principle of continuity, *i.e.*, of a succeeding Government accepting what has been done by its predecessor, and, if the qualification introduced by the Lord Justice were to be read as authorizing a Court to treat as a nullity political decisions and actions of a former Government which have resulted in the transfer of property to third parties in circumstances like the present, their Lordships would respectfully disagree. At the same time, their Lordships must not be understood to reject the possibility of our Courts refusing, in a conceivable case, to recognize the validity of the disposal of State property by a Government on the eve of its fall, *e.g.*, by a despot, who knows that previous recognition is just being withdrawn, where it is clear that his purpose was to abscond with the proceeds, or to make away with State assets for some private purpose.

"The second ground on which the decision appealed against was based in the Hong Kong Courts (Gould J. dissenting) depends on the alleged retroactive effect of the recognition by His Majesty's Government in the United Kingdom of the Communist Government as the *de jure* Government of China as from January 5/6, 1950. This argument assumes that up to December 12, 1949, the aeroplanes were the disposable property of the Nationalist Government and that it validly transferred them as specific and ascertained goods by the contract of that date to the appellant's predecessors in title. On this assumption, the appeal can fail only if the subsequent recognition *de jure* of the Communist Government annulled the passing of the property. Subsequent recognition

de jure of a new Government as the result of successful insurrection can, in certain cases, annul a sale of goods by a previous Government. If the previous Government sells goods which belong to it but are situated in territory effectively occupied at the time by insurgent forces acting on behalf of what is already a *de facto* new Government, the sale may be valid if the insurgents are afterwards defeated and possession of the goods is regained by the old Government. But if the old Government never regains the goods and the *de facto* new Government becomes recognized by Her Majesty's Government as the *de jure* Government, purchasers from the old Government will not be held in Her Majesty's Court to have a good title after that recognition.

"Primarily, at any rate, retroactivity of recognition operates to validate acts of a *de facto* Government which has subsequently become the new *de jure* Government, and not to invalidate acts of the previous *de jure* Government. It is not necessary to discuss ultimate results in the hypothetical case when, before the change in recognition, both Governments purport to deal with the same goods. The crucial question under this branch of the analysis in the present appeal is whether anything that happened in Hong Kong to these aeroplanes at the instigation of or on behalf of the *de facto* Communist Government before the change of recognition on January 5/6, 1950, is retrospectively validated, so that the title conferred by the contract of December 12, 1949, is extinguished. It might be too wide a proposition to say that the retroactive effect of *de jure* recognition must in all cases be limited to acts done in territory of the Government so recognized, for the case of a ship of the former Government taken possession of by insurgents on the high seas and brought into a port which is under the control of the *de facto* Government would have to be considered: see *Banco de Bilbao v. Sancha* ([1938] 2 All E.R. 253; [1938] 2 K.B. 176; 107 L.J.K.B. 691; 159 L.T. 369; Digest Supp.). But the actual question now to be answered concerns chattels in the British colony of Hong Kong, which chattels at the time of the sale belonged to the Nationalist Government. Whatever the degree of physical control over these chattels maintained by the defecting ex-employees, this control was in defiance of the injunction granted by the Supreme Court of Hong Kong on November 24, 1949. Moreover, if these persons could be regarded as acting on behalf of the *de facto* Communist Government, their action would be a direct infringement of the Representation of Foreign Powers (Control) Ordinance of November 4, 1949, and would be a criminal offence by the law of Hong Kong. Section 3 of this ordinance provides: 'No Person shall function on behalf of

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any foreign power without the consent of the governor. . . .'
"By section 2 'foreign power' is defined to include '(a) the Government whether legal or *de facto* of any foreign State'. The governor gave no consent. In such circumstances the action of those who illegally took control of these aeroplanes cannot give ground for the principle of retroactivity. Gould J. pointed out that Lord Wright's proposition ([1938] 1 All E.R. 731) in *Compania Naviera Vascongado v. Cristina S.S.*, that it did not matter by what mode possession was obtained

' . . . was in relation to a claim of sovereign immunity arising from the independent status in international law of the foreign sovereign. In the present case no such question can be considered and the Court must make a declaration of legal rights. If those rights are dependent to any extent on possession of the subject-matter of the dispute, I think that acquisition of possession by a wrongful act cannot confer upon the party so acquiring it any benefit which he did not previously enjoy. In other words, the question must be settled with reference to the right to possession . . . My opinion, therefore, upon this aspect of the case is that the Central People's Government could not show any superior title or right to possession; nor can it rely upon any rights arising out of actual possession acquired in the way it was; therefore, it had no possession which could bring into effect the doctrine of retroactivity. That doctrine, I think, relates to the acts of a Government which has already acquired jurisdiction through possession and cannot include the actual act of taking possession if that act be wrongful. On this point I hold therefore, that the ordinary principle of continuity was not displaced by any consideration of retroactivity and that it follows that the Nationalist Government was entitled to possession of and had jurisdiction over the aeroplanes.'

" Their Lordships agree with the argument and conclusions of Gould J. on this point.

" The learned Judge attached importance to the announcement of October 1, 1949, the authors of which proclaimed themselves to be the Government of China, and to the decree issued on that date purporting in the name of that Government to dismiss the ministers of the Nationalist Government. Their Lordships cannot accept the view that this is any reason for saying 'that as from October 1, 1949, these aircraft were owned by the Central People's Government'. They adopt on this point the opinion of Gould J., who observed:

' The purported dismissal on October 1, 1949, of the ministers of the Nationalist Government . . . can only be deemed effective within the territory and as regards assets from time to time in the control of the People's Government. Elsewhere, and as long as the Nationalist Government retained *de jure* recognition, such a decree could have no effect.'

“ For the above reasons their Lordships have reached the conclusion that the appeal should be allowed.”

[Reports: [1953] A.C. 70; [1952] 2 All E.R. 733; *Hong Kong Law Reports*, 35 (1951), p. 215.]

NOTE.—Subsequent to this Opinion of the Judicial Committee of the Privy Council in the present case, a further—final—action was brought by *Civil Air Transport Incorporated* against *China National Aviation Corporation*, in which the former, an American corporation, asked for a declaration of ownership of the thirty-one aircraft claimed to have been purchased from the *de jure* Government of China. In view of the Opinion of the Judicial Committee,¹ the Hong Kong Supreme Court, in a decision of October 8, 1952, made the declaration as requested. The Court said (*per* Sir Gerard Howe C.J.):

“ From the evidence before me, it is clear that the assets in this case were sold by the corporation, a legal entity, in accordance with Chinese law and within the scope of the Memorandum and Articles of Association of that Corporation, and that the plaintiff purchaser was duly incorporated under the relevant laws of its domicile and that where there were requirements under these laws, those requirements have been met. There is therefore no question that a valid sale has taken place in law and that the assets in Hong Kong passed by these contracts. The question as to whether the then *de jure* Government had power to enter into such a sale—and here it must be remembered that the then *de jure* Government so acted as shareholders in the Corporation which was the legal vendor—in view of the action taken by the then *de facto* Government has been decided in the judgment of the Full Court in Appeal No. 5 of 1951 and the only outstanding question has been decided by the appeal brought from that judgment to the Judicial Committee of the Privy Council.

“ I find myself in agreement with Mr. D’Almada, Q.C., when he distinguishes this present case from *Banco de Bilbao v. Sancha*, [1938] 2 K.B.; and I note the recent decision of the House of Lords in *Gdynia Ameryka Linie v. Bogustawski and Another*, (1952) 2 The Times Law Reports. [See Case No. 19 in this volume.]

“ In the event, therefore, I am bound by these decisions relating to international law and, in respect of the sale itself, I hold that it was properly concluded under the domestic law of the respective parties.

“ There must therefore be a declaration that the thirty-one aircraft now in the Government airport at Kai Tak together with all spare parts, machinery and equipment for use in relation thereto are the property of the plaintiffs.” [Reports: *Hong Kong Law Reports*, 36 (1952), p. 302; [1952] 2 All E.R. 733; [1953] A.C. 70.]

Governments—Recognition of—Effect of Non-Recognition—The Right to Sue.

See Case No. 39 (*Republic of China v. American Express Co.*).

¹ While the Opinion of the Judicial Committee is dated October 12, 1952, it appears that the result of its deliberations was announced earlier, namely, after the conclusion of the hearings between July 21 and 28.

Recognition—Of Governments—Non-recognition—Judicial Notice of Actual Control of Territory by Unrecognized Government.

See Case No. 93 (*In re Yee Yoke Ban's Estate*).

Recognition—Of Governments—Nature of—Declaratory Effect.

See Case No. 42 (*Martin v. Bank of Spain*).

E.—STATE SUCCESSION

II.—Succession with Regard to Contractual and Other Obligations, and Concessions

Case
No. 21

State Succession—Contractual Obligations—Debt Incurred by Colony Subsequently Becoming a Sovereign State—Netherlands Indies and Republic of United States of Indonesia.

PAMANOEKAN & TJIASEMLANDEN AND ANGLO-DUTCH
PLANTATIONS OF JAVA, LTD. *v.* STATE OF THE
NETHERLANDS.

Holland, District Court of The Hague. April 3, 1952.

THE FACTS.—Before the Japanese occupation of the Netherlands Indies the plaintiffs had concluded agreements with the Bank of Java pursuant to which the former transferred to the latter, against payment, their bank balances in dollars which they had obtained from the sale and export of their products to America. After the Japanese invasion, this procedure became impossible. A new arrangement was therefore come to in 1942 between the two plaintiff companies and the finance department of the Ministry for the Colonies of the Netherlands Government in London, under which the plaintiffs were to pay further balances to the Netherlands Purchasing Commission in New York, to the account of the Netherlands Ministry for the Colonies, the countervalue to be paid by the latter in London in sterling. When this operation also proved no longer to be feasible, the plaintiffs continued paying their balances to the Netherlands Purchasing Commission in New York, expressing their confidence in eventually being generously treated by the Netherlands Indies Government. After the war, the Netherlands Government refused to remit to the plaintiffs the countervalue of their balances,

amounting to nearly \$750,000, out of the Netherlands Treasury, on the ground that the debt attached not to the State of the Netherlands but at first to the Netherlands Indies, a body corporate under private law, and, subsequently, to the new Indonesian Republic. Thereupon the plaintiff companies sued the State of the Netherlands for payment of the debt.

Held: that the action must fail. The State of the Netherlands was not concerned with the debt. The original agreement was entered into by the Government of the then Netherlands Indies, a body corporate. The negotiations with London had made no difference. They had been conducted exclusively by the finance department of the Ministry for the Colonies of the Netherlands Government in London, without any intervention of the Netherlands Ministry of Finance. It was clear that only the then Netherlands Indies were regarded as a party to the transaction. This was constitutionally correct: the Netherlands Indies, as a legal *persona* under private law, were legally represented in such transactions by either the Governor-General or the Minister for the Colonies. The only debtor, therefore, was the body corporate of the Netherlands Indies first, and subsequently, after the transfer of sovereignty in December 1949, by way of succession, the new Republic of Indonesia.

[Report: *N.J.*, 1954, No. 84.]

State Succession—Succession to Contractual Liabilities—Partition—Division of State into Two Separate States—India and Pakistan—Which of the Two States Succeeds to the Contractual Obligations of the Former Union—Indian Independence (Rights, Property and Liabilities) Order, 1947—The Law of India. **Case No. 22**

THE UNION OF INDIA *v.* CHINUBHAI JESHINGBAI.

India, High Court of Bombay (Original Civil).

(Chagla C.J.; Tendolkar J.)

April 2, 1952.

THE FACTS.—The respondents were carrying on business as a firm in Baroda, and on March 10, 1947 (before the partition of India, which took effect on August 15, 1947) they had contracted to purchase from the Government of India certain quantities of long cloth which were then lying at the Ordnance Parachute Factory at Lahore. Under this contract the goods sold required to be stamped and the stock removed within twenty-one days of the stamping. The respondents had paid for the goods by three sale notes, but owing to the serious communal situation in Lahore in August 1947, the goods could not then be stamped at Lahore, but had to be sent away for

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this purpose. Although it was an important issue of fact whether the goods were lying in Lahore at the material date, August 15, 1947, the parties, in the original hearing, did not apply their minds to this issue, but appear to have assumed that the goods were still in Lahore at that date. The importance of this fact was that the *situs* of the goods on the date of the partition determined whether India or Pakistan was liable on the contract. At the original hearing the parties were in dispute as to the meaning of the words of the Indian Independence (Rights, Property and Liabilities) Order, 1947, "exclusively for the purposes of the Dominion of Pakistan", since that Order provided that for contracts exclusively for the purposes of Pakistan, Pakistan alone, and not India, should be liable, even though the original contract had been entered into by a United India. The respondents contended that the words "exclusively for the purposes" meant for the actual benefit of, and that since the contract had been concluded, and payment under the contract made, before partition, and since India was in receipt of the sums due under that contract, the contract could not be described as being for the exclusive purposes of Pakistan. The Government of India, on the other hand, contended that since the goods (as they assumed) were lying at Lahore on August 15, 1947, therefore, because Lahore was then in Pakistan, Pakistan alone was liable on the contract. The Court decreed judgment for the respondents, and from this decision the Union of India appealed.

Held: that the Court could not, upon the facts as presented, reach any final conclusion, and it therefore ordered a re-trial of the issue as to "Whether the goods covered by the three sale notes were lying in the territory constituting the Dominion of Pakistan as constituted by the Indian Independence Act on August 15, 1947?" The Court held that unless this matter were decided it would be impossible to fix liability for the performance of this contract because on a true construction of the Indian Independence (Rights, Property and Liabilities) Order, 1947, made in pursuance of the Indian Independence Act, 1947, goods originally belonging to the Government of (United) India found lying on August 15, 1947, at a place which formed part of the Dominion of Pakistan fell under the control of that Dominion and that Dominion was entitled to exercise rights of ownership with regard to such goods. Therefore, the liability in respect of a contract with respect to those goods made with the Government of India prior to the Partition of India also devolved upon the Dominion of Pakistan, and any right that a citizen of India had in respect of such a contract could only be asserted against the Dominion of Pakistan and not against the Union of India. Therefore, although the

plaintiffs had contracted with the Government of India to purchase the goods and had paid the price thereof to the Government of India prior to partition, nevertheless, their rights under the contract in respect of those goods could be enforced only against the Dominion of Pakistan if it was found as a matter of fact that those goods were lying in Pakistan on August 15, 1947.

Chagla C.J. said: " This appeal raises a very short question as to the liability of the Union of India to discharge a liability arising under a contract which was entered into prior to partition and in respect of goods which according to the Union of India belonged to Pakistan on the appointed day, *viz.*, August 15, 1947. . . . These goods were purchased by the plaintiffs, who are residents of Baroda, by three sale notes executed on March 10, 1947. . . . The evidence shows . . . that through no fault of the plaintiffs the goods could not be stamped at Lahore because of the serious communal situation that prevailed in Lahore in the month of August 1947. The evidence also shows that a representative of the plaintiffs and of the Textile Commissioner in Bombay did see the goods in Lahore on August 10, 1947, but on that day nothing could be done and the goods could not be stamped. . . . The plaintiffs paid the full price in respect of these goods including the stamping charges to the Government of India prior to August 15, 1947."

The learned Chief Justice then reviewed the facts which had led to the filing of the suit against the Union of India. The plaintiffs, he observed, had asked the Textile Commissioner at Bombay to bring the goods lying at Lahore to Bombay, or, alternatively to supply other, similar, goods. The Government of India, however, had repudiated all liability and had referred the plaintiffs to the Government of Pakistan. The Government of Pakistan had declined to perform the contract because " the sale notes had been cancelled as the stores were not available " and " with regard to the refund of the money the plaintiff[s] were asked to refer to the Textile Commissioner, Government of India, Bombay ". However, as neither Government seemed disposed to refund the money, the suit had been filed. The learned Chief Justice continued:

" . . . The only point that has been urged by the Attorney-General is that under the Indian Independence (Rights, Properties [*sic*] and Liabilities) Order of 1947, any liability arising under the contract in suit had to be discharged by the Government of Pakistan and that the Union of India was not liable in respect of any such liability. . . . Therefore, it is only this short contention of the Attorney-General that remains to be considered in this appeal.

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“ Now, in order to appreciate the point urged before us by the Attorney-General, in the first instance we have . . . to look at the Independence Act. Section 9 of that Act provides that the Governor-General shall by order make such provision as appears to him to be necessary or expedient and we are here concerned with sub-clause (b).

‘ for dividing between the new Dominions and between the new Provinces, to be constituted under this Act, the powers, rights, property, duties and liabilities of the Governor-General in Council or, as the case may be, of the relevant Provinces which, under this Act, are to cease to exist.’

The object of enacting this section is clear. On August 15, 1947, undivided India was to be split up into two Dominions. The rights, property, assets and liabilities which belonged to united India had now to be shared and distributed between the two new Dominions which were being set up. It is significant to note that section 9 (b) refers not merely to powers, rights, property and duties of the Governor-General in Council, but also to his liabilities. Pursuant to this section an order was passed which is known as the Indian Independence (Rights, Property and Liabilities) Order, 1947, and it is this Order that falls to be interpreted at our hands. Article 3 of this Order provides that the provisions of this Order relate to the initial distribution of rights, property and liabilities consequential on the setting up of the Dominions of India and Pakistan and shall have effect subject to any agreement between the two Dominions or the Provinces concerned and to any award that may be made by the Arbitral Tribunal. Therefore, it is clear that this Order provided for distribution of rights, property and liabilities subject to the provision being modified or altered by any subsequent agreement between the two Dominions and subject to any award that may be made by the Arbitral Tribunal which was to be set up in accordance with the Arbitral Tribunal Order of 1947. It is in this sense that the expression “ initial ” is used in Article 3. What was in contemplation was that although this Order would make arrangements for distribution of rights, property and liabilities which were necessary in view of the setting up of the Dominions of India and Pakistan, the arrangements made may not be final, they were only initial, and ultimately these arrangements might be modified or altered by any agreements between the two Dominions or any award to be made by the Arbitral Tribunal. Sub-clause (3) of Article 3 provided that the powers of control over property conferred upon each of the Dominions by this Order shall include all the powers of use, consumption, management and disposition incident to ownership. Therefore, the control over property which was conferred upon the two

Dominions by this Order was of such a nature as exercisable by the owner of property. Article 4 dealt with land and it provided that all land which immediately before the appointed day is vested in His Majesty for the purposes of the Governor-General in Council shall on that day—(a) in case of land situated in India or in the tribal area on the borders of India, be under the control of the Dominion of India, (b) in the case of land situated in Pakistan or in the tribal areas on the borders of Pakistan, be under the control of the Dominion of Pakistan. Therefore, as far as land was concerned, the method adopted for division and distribution was clear and simple. Land which was in Pakistan went to that Dominion and land which was in the Dominion of India went to the Dominion of India. Then Article 6 applied the provisions of Article 4 and Article 5, which deals with the two provinces of East and West Bengal, to goods, coins, bank notes and currency notes, and it provided that these articles shall apply in relation to all goods, coins, bank notes and currency notes which immediately before the appointed day are vested in His Majesty for the purposes of the Governor-General in Council or of a province as they apply in relation so vested. Therefore, reading Articles 4 and 6 with which we are concerned, if goods, coins, bank notes and currency notes were situated in India or in tribal areas on the borders of India, they were to fall under the control of the Dominion of India, and control meant by reason of Article 3 (3) that the Dominion of India, had all the powers with regard to those goods which go with ownership. Articles 4 and 6 having dealt with land and goods, Article 8 dealt with contracts, and Article 8 (1) provided:

‘ Any contract made on behalf of the Governor-General in Council before the appointed day shall, as from that day,—

(a) if the contract is for purposes which as from that day are exclusively purposes of the Dominion of Pakistan, be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General in Council; and

(b) in any other case, be deemed to have been made on behalf of the Dominion of India instead of the Governor-General in Council; and all rights and liabilities which have accrued or may accrue under any contract shall, to the extent to which they would have been rights or liabilities of the Governor-General in Council, be rights or liabilities of the Dominion of Pakistan or the Dominion of India, as the case may be.’

Therefore, Article 8 (1) deals with contracts which were entered into on behalf of the Governor-General in Council before August 15, 1947, and the provision was that if the contract was exclusively for the purposes of the Dominion of

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Pakistan, then the contract was deemed to have been made on behalf of the Dominion of Pakistan. Therefore, it is clear that although in fact the Governor-General in Council might have entered into a contract with a citizen of India and although he may have undertaken liabilities under that contract and although certain rights might accrue to the citizen under that contract, if the contract was found to be on August 15, 1947, exclusively for the purposes of Pakistan, then the contract was deemed to be a contract made by the Dominion of Pakistan. Therefore, the actual making of the contract by the Governor-General in Council prior to August 15, 1947, was immaterial. What was material was whether on August 15, 1947, it could be considered that the contract was for the purposes of the Dominion of Pakistan. If it was for the purposes of the Dominion of Pakistan, then it became a contract made by the Dominion of Pakistan and all rights and liabilities which might have accrued or which may accrue in future in respect of such contract would accrue to the Dominion of Pakistan again notwithstanding the fact that the contract was originally entered into by the Governor-General in Council. Therefore, Article 8 provided for a method of dividing contractual rights and liabilities which were entered into on behalf of undivided India by the Governor-General in Council prior to August 15, 1947, and the line of demarcation which was indicated by Article 8 was to consider whether a particular contract was for the purposes of the new Dominion of Pakistan, in which case the rights and liabilities fell to the share of that Dominion, and in all other cases it fell to the share of the Dominion of India.

“ Now, the view has been taken by the learned Judge [in first instance] that under Article 8 (1) the rights of third parties have not been affected or interfered with. The learned Judge takes the view that although this Order might determine the rights of the two Dominions *inter se*, it cannot affect the rights of third parties because according to him there is no express legislation affecting the rights of third parties. With very great respect to the learned Judge, it is difficult to understand how it is possible to take the view that this Order which deals with contractual rights and liabilities did not seek to affect or modify the rights of third parties. In every case where the Governor-General in Council before partition had entered into a contract with an Indian subject, rights of third parties were bound to be involved; liabilities would accrue to the Government under the contract; rights would accrue to the subject under the contract; and it was in order to deal with these rights and these liabilities that provision was made by the Order which we are considering. If rights of third parties

were not to be affected at all, then no question could have arisen of making any distribution or division with regard to contractual rights and liabilities. . . . [The learned Chief Justice then dealt with arguments concerned with this reasoning. He continued:]

“There is a further and very clear indication that the rights of third parties were intended to be affected and that is to be found in Article 12 of the Order which provides:

‘(1) Where immediately before the appointed day the Governor-General in Council is a party to any legal proceedings with respect to any property, rights or liabilities transferred by this Order, the Dominion which succeeds to the property, rights or liabilities in accordance with the provisions of this Order shall be deemed to be substituted for the Governor-General in Council as a party to those proceedings.’ . . .

[Hence, in the view of the Court, it was clear that the Article had in mind the position of third parties. The Chief Justice continued as follows:]

“But the more interesting and important question which has been debated at the bar is, what is the proper meaning to give to the expression ‘a contract for the exclusive purposes of the Dominion of Pakistan.’ It is conceded by the Attorney-General that it is only if this particular contract is held to be for the exclusive purpose of the Dominion of Pakistan that the Union of India can succeed in the contention it has put forward, *viz.*, that under this Order the liability has devolved upon the Dominion of Pakistan and the Union of India is no longer liable. We have to construe the expression ‘a contract exclusively for the purposes of the Dominion of Pakistan’ with reference to the facts of this case. The fact on which the Union of India relied in order to put forward this contention was that the goods covered by the contract were on August 15, 1947, lying at Lahore, and what has been pressed upon us by the Attorney-General is that if the goods were lying at Lahore on August 15, 1947, then the contract in respect of these goods must be a contract for the exclusive purposes of the Dominion of Pakistan. Let us examine this argument. If the goods were lying at Lahore on August 15, 1947, then undoubtedly by reason of Article 6 the goods would be under the control of the Dominion of Pakistan and the control contemplated by that article as already explained would be the control that an owner would have over goods belonging to him. Therefore, we have, [if] the allegation of the Union of India is correct, a contract in respect of goods belonging to the Dominion of Pakistan. Can it be said that a contract in respect of goods belonging to the Dominion of Pakistan is a contract for the exclusive purposes of that Dominion? [The learned Chief

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Justice observed that the test of purpose could not apply when the contract was made as, *ex hypothesi*, Article 8 dealt with contracts made by an undivided India. He continued:] The test . . . is an artificial test and . . . may be either if the contract had been entered into on August 15, 1947, whether it would have been a contract for the purposes of the Dominion of Pakistan, or, if the Dominion of Pakistan had been in existence when the contract was entered into, whether it would have been a contract for the purposes of Pakistan. It is difficult for us to understand how it is possible to argue that when a State or Dominion enters into a contract in respect of property or goods belonging to it, it is not a contract for the purposes of that State or Dominion. Sir Jamshedji contends that 'for the purposes' must be construed to mean 'a contract which enures for the benefit of a particular Dominion'. In our opinion that is not at all the proper test. Once it is conceded that property belongs to a particular State or Dominion and the State or Dominion enters into a contract with a third party in respect of that property or goods, then the contract in its very nature is for the purposes of that State or Dominion. Article 8 introduces a legal fiction and converts by that legal fiction a contract which was originally entered into by the Governor-General in Council to a contract for the purposes of one Dominion or the other.

"It is interesting to look at the Government of India Act which was undoubtedly before the draftsman of the Independence Act, and we have similar language used in section 175 of that Act. The draftsman of the Government of India Act also had a similar problem to face as the draftsman of the Independence Act. As it is well known, the Government of India Act, 1935, sought to set up a Federation and various Provinces in India as a constituent unit, and the problem that the draftsman of the Act of 1935 had to face and surmount was to divide property and assets which originally belonged to the Government of India as a unit between the Federation and the Provinces, and turning to section 175 [we] find that it was provided that:

'The executive authority of the Federation and of a Province shall extend to the grant, sale, disposition or mortgage of any property vested in His Majesty for the purposes of the Government of the Federation or of the Province, as the case may be, and to the purchase or acquisition of property on behalf of His Majesty for those purposes respectively, and to the making of contracts.'

Therefore, there also the property which was originally vested in His Majesty had to be distributed between the Federation and the Provinces from the point of view of the purposes for which

the property was meant, either for the purposes of the Federation or for the purposes of the Province. Similarly under the Independence Act all property, immovable or moveable, was distributed between the two Dominions and the contracts relating to these properties were also divided in a similar way, and therefore when Article 8 refers to 'purposes of the Dominion', the expression is used in a very wide connotation and not in the narrow restricted sense as suggested by Sir Jamshedji.

" Therefore, in our opinion, on a true construction both of the Independence Act and the Indian Independence (Rights, Property and Liabilities) Order, it is clear that when it is found that there were goods originally belonging to the Government of India lying at a place which formed part of the Dominion of Pakistan on August 15, 1947, those goods fell under the control of that Dominion and that Dominion was entitled to exercise rights of ownership with regard to those goods, and it is equally clear that when a contract had been entered into with respect to those goods prior to August 15, 1947, all liability in respect of that contract devolved upon the Dominion of Pakistan and any rights that a citizen in India had in respect of that contract could only be asserted against the Dominion of Pakistan and not against the Union of India. . . .

" Now a difficulty has arisen in this case by reason of the fact that the true legal position was not properly appreciated in the Court below. As I have pointed out, there is a specific averment in the written statement of the Union that the goods covered by the contract were lying at Lahore on August 15, 1947. The importance of this averment will be realized in view of what we have just stated. . . . Sir Jamshedji says it might well be that the goods were destroyed in the riots that were raging in Lahore not only subsequent to August 15, 1947, but even before that date, . . . I think there is force in Sir Jamshedji's contention, and we should remand this matter to the Court below for a proper and explicit finding on evidence properly laid as to whether the goods were or were not lying in Pakistan on August 15, 1947. It would be open to the learned Judge to find that the goods were lying in Lahore on August 15, 1947, or that they were destroyed prior to August 15, 1947, or that they had been transferred from Lahore to some other place which was in the Union of India. . . .

" We would, therefore, send the matter down to the learned Judge and direct him to try the following issue:

' Whether the goods covered by the three sale notes were lying in the territory constituting the Dominion of Pakistan as constituted by the Independence Act on August, 15th 1947 ? '

"The Attorney-General gives up all other issues."

[Report: I.L.R. [1953] Bom. 117.]

NOTE.—For further references to the Indian Independence (Rights, Property and Liabilities) Order, 1947, see the decision in *Chaman Lal Loona and Co. v. Dominion of India* (Case No. 23 in this volume).

Case No. 23 **State Succession—Contractual Obligations—Benefit of the Contract—Partition—Succession by Components of Former Union to the Contractual Liability of the Union—India and Pakistan—Indian Independence (Rights, Property and Liabilities) Order, 1947—The Law and Constitution of India.**

CHAMAN LAL LOONA AND CO. *v.* DOMINION OF INDIA,
NEW DELHI.

India, High Court of Punjab (Appellate Civil).
(Khosla and Harnam Singh JJ.)

July 17, 1952.

THE FACTS.—The appellants supplied fodder to the Military Dairy Farm at Lahore, under a contract entered into with the Government of (United) India in 1945. On August 15, 1947, the partition of India occurred and Lahore became part of Pakistan. On August 10, 1948, the appellants filed an application in the Court of the Sub-Judge at Ferozepore, India, under sections 20 and 8 (2) of the Arbitration Act, for reference of a dispute which had arisen concerning this contract to arbitration in accordance with the terms of the contract. The Dominion of India opposed the application on the ground that under clause 8 of the Indian Independence (Rights, Property and Liabilities) Order, 1947, it was not liable. Clause 8 of this Order provides, *inter alia*, as follows:

"(1) Any contract made on behalf of the Governor-General in Council before the appointed day shall, as from that day, (a) if the contract is for the purposes which as from that day are exclusively purposes of the Dominion of Pakistan, be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General in Council; and (b) in any other case, be deemed to have been made on behalf of the Dominion of India instead of the Governor-General in Council; and all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the Governor-General in Council be rights or liabilities of the Dominion of Pakistan or the Dominion of India, as the case may be."

This contention of the Indian Government was upheld by the

trial Court and the application of the appellants was dismissed. The applicants then appealed to the High Court.

Held: that the appeal must be allowed. Although Lahore was in the territory of Pakistan at the date of partition and although the test of the exclusive purposes of Pakistan was generally the test of *situs* of the subject-matter of the contract, this contract concerned military stores and was subject to special regulation¹ apart from clause 8 of the Indian Independence (Rights, Property and Liabilities) Order, 1947. Moreover, in apportioning liability under this Order regard must be had to the purpose of the contract, and this purpose would be the purpose after August 15, 1947. *Union of India v. Loke Nath Saha*, 55 C.W.N. 195, dissented from; *Province of West Bengal v. The Midnapore Zemindary Co.*, 54 C.W.N. 677, followed.

Khosla J. said: "... The argument of the learned Advocate-General is that this contract must be deemed to be a contract exclusively for the purposes of Pakistan because the Military Farm, Lahore, is situated within the territory of the Dominion of Pakistan and the geographical location of the place where the consignment was to be made determines the purpose within the meaning of Article 8. . . ."

The learned Judge remarked that it had been argued in reply that as the fodder was in the nature of military supplies and constituted military stores, it was governed by the Joint Defence Council Order, 1947, and hence the contract was not to be considered as exclusively for the benefit of Pakistan. He said that, for the purposes of this case, it would be assumed that the fodder, the subject-matter of the contract, constituted military stores, and he made this clear because the decision of the Court in this case would necessarily apply to many other similar contracts for the supply of military stores.

The Judge then continued by reading Article 8 of the Indian Independence (Rights, Property and Liabilities) Order, and observed:

"The meaning of Article 8 (1) appears to me to be that where there is a contract for a certain purpose we must examine the nature of that purpose after August 15, 1947, and if on that day the purpose is exclusively the purpose of the Dominion of Pakistan then the liability under that contract will be the liability of the Dominion of Pakistan. The date on which the contract is to be performed is, in my view, immaterial. If any liability under the contract subsists the contract is alive as a chose in action and, therefore, even if the contract was performed before August 15, 1947, the liability under it remains undischarged. In apportioning liability regard must be had to the purpose of the contract and this purpose will be the

¹ Being the Joint Defence Council Order, 1947.

Case
No. 23
Contd.

purpose after August 15, 1947. Our attention was drawn to *Union of India v. Loke Nath Saha* . . . , in which it was held that the contract for the carriage of goods between two stations which are now in Pakistan was not a contract exclusively for the purpose of the Dominion of Pakistan because the goods were to be carried in March, 1947, before the Dominion of Pakistan was ever thought of. With great respect this decision does not appear to me to lay down correct law. The purpose in that case was the carriage of goods on the railway and that purpose after August 15, 1947, would be exclusively a purpose of Pakistan. Therefore, where there has been a complete transfer of a certain department, or of assets and liabilities of a certain type after the partition, the purpose which was originally the purpose of India will be treated as the purpose of Pakistan. For instance the supply of goods to a hospital or educational institution now situated in Pakistan would be deemed to be the exclusive purpose of the Dominion of Pakistan within the meaning of Article 8 (1). Reference may be made to the *Province of West Bengal v. The Midnapore Zemindary Co.*, . . . in which the lease of a house which was used as a hospital was considered to be entirely for purposes of West Bengal because the house was situated in West Bengal. In the present case the Lahore Military Farm is situated at Lahore and whether the fodder was supplied in 1945 or after August 15, 1947, the purpose will be deemed to be a purpose of the Dominion of Pakistan on account of the territorial situation of Lahore. But in the present case the fodder was to be supplied to a Military Farm and the fodder, therefore, constituted Military Stores. Military Stores were kept under the exclusive control of the Joint Defence Council who had the power of allocating those stores among the two Dominions and for transferring them from one place to another. Therefore fodder lying in the Military Farm, Lahore, was not on August 15, 1947, the exclusive property of the Dominion of Pakistan but was under the exclusive control of the Joint Defence Council. This fodder could be transferred to a farm in India and thus could become the property of the Dominion of India. In the circumstances it cannot be said that the contract for supply of fodder to the Military Farm, Lahore, was a contract exclusively for the purposes of the Dominion of Pakistan if the contract were viewed on August 15, 1947, and that being so it must be held that the contract was not a contract for the exclusive purposes of the Dominion of Pakistan. The decision of the learned trial Judge on this point must, therefore, be set aside."

The learned Judge then rejected the distinction urged at the Bar that clause 8 (1) applied only to executory and not to executed contracts. He observed that a cursory examination

of that clause would be sufficient to discredit this contention. He then discussed the question of the jurisdiction of the Court, observing that "... the question of jurisdiction . . . must depend on whether the plaintiff is a displaced person. If he is, he is entitled to file a suit in a Court within whose jurisdiction he resides, otherwise the suit must be filed at a place where the cause of action arose in part or in whole. . . ." Having decided that the appellant had satisfied the requirements of the jurisdiction, the learned Judge concluded:

" . . . This appeal must, therefore, be allowed and allowing it I would dismiss the respondents' application for execution; . . . "

Harnam Singh J. delivered a concurring judgment.

[Report: I.L.R., [1953] VI Punjab 233.]

NOTE.—See also *The All India Live Stock Supply Agency v. (1) The Governor-General in Council*, (2) *The Dominion of India*, (3) *The Federation of Pakistan* (Case No. 24 in this volume); and *Ramesh Chandra Das v. State of West Bengal*, I.L.R. [1953] 2 Cal. 249, for further reference to the Indian Independence (Rights, Property and Liabilities) Order, 1947. In the case of *Ramesh Chandra Das v. State of West Bengal*, decided on August 27, 1952, the Indian High Court of Calcutta (Appellate Civil), held (*per* Das and Mookerjee JJ.) that under the Indian Independence (Rights, Property and Liabilities) Order, 1947, where a cause of action (in this case for the wrongful dismissal of an employee of the Indian Government) had arisen and was pending before the partition of India, and arose wholly within territory which after partition remained part of India, then the cause of action would continue to lie exclusively against the Government of India and was not affected by the partition.

State Succession—Contractual Obligations—Benefit of the Contract—Partition—Succession by Components of Former Union to Contractual Liability of the Union—Pakistan and India—India Independence (Rights, Property and Liabilities) Order, 1947—The Law of Pakistan.

**Case
No. 24**

THE ALL INDIA LIVE STOCK SUPPLY AGENCY *v.*

(1) THE GOVERNOR-GENERAL IN COUNCIL, (2) THE DOMINION OF INDIA, (3) THE FEDERATION OF PAKISTAN.

Pakistan, Chief Court of Sind, Karachi (Original Civil).

(Vellani J.)

August, 1952.

THE FACTS.—Under an agreement entered into with the Governor-General of India (acting on behalf of the Government of a then united India) before August 15, 1947, the plaintiffs agreed to supply milch and in-calf cows to the Military Farm at Malir, near Karachi, situated in territory which subsequently became part of Pakistan. The plaintiffs duly performed their

Case
No. 24
Contd.

part of the agreement before August 15, 1947. On that date the partition of India took place, and India and Pakistan became separate States. Subsequently, a dispute arose as to the terms of the agreement, which resulted in the plaintiffs bringing a suit against the Governor-General in Council, the Dominion of India and the Federation of Pakistan, it being uncertain which of these parties was liable on the contract after the partition. The Court was thus called upon to determine, *inter alia*, which of the two Dominions was liable.

The test prescribed for determining this issue was laid down in the Indian Independence (Rights, Property and Liabilities) Order, 1947, whereby it was provided that the Dominion for the exclusive purposes of which the contract had been made should be liable thereupon after the date of partition. In the course of argument before the Court it was contended, *inter alia*, that if the contract had been executed, or, to use the phrase actually employed, if the contract were spent, before August 15, 1947, then India alone ought to be liable on it.

Held: that the Federation of Pakistan alone was liable upon the contract. The supply of cows to a farm at a place which lay within the territory of Pakistan, even though the cows were sent there before Pakistan came into existence, must be considered as being for the exclusive purposes of Pakistan within the meaning of the Indian Independence (Rights, Property and Liabilities) Order, 1947.

Vellani J. said, *inter alia*: "Upon reading as a whole the words 'if the contract is for purposes which as from that day [August 15, 1947] are exclusively purposes of the Dominion of Pakistan', it becomes manifest that the tense of the word 'are' follows the tense of the word 'is'. These words enjoin the consideration of the question whether the contract is for purposes which from August 15th 1947 are exclusively the purposes of Pakistan, and that explains the present tense used.

"Now a liability may exist or arise or become known in various circumstances either before or after a contract becomes 'spent', and therefore it is unlikely that the question whether the contract is spent or not on August 15th 1947 would be a convenient test for the ascertainment of the liability of one Dominion or the other. On the other hand, provision was required for the division of all rights and liabilities which had accrued or may accrue under any contract whether spent or not, which had been made on behalf of the Governor-General in Council.

"The purposes of supplying military personnel with milk and dairy produce as from August 15th 1947 at or around Malir are obviously purposes for the Dominion of Pakistan. . . .

“ The conclusion therefore is that the liability is that of the Federation of Pakistan. . . . ”

[Report: Pak. L.R. (1952) Kar. 94.]

NOTE.—See also *Mehardil Elahibux v. The Federation of Pakistan and the Dominion of India* (Pak. L.R. (1952) Kar. 126), also decided by the Chief Court of Sind (Vellani J.), in which it was *held* that, under the Indian Independence (Rights, Property and Liabilities) Order, 1947, a contract made with the Governor-General of India before the partition of India for the conveyance of eggs by rail from a place which after the partition lay within India, to a place which thereafter was situated in Pakistan, was, by virtue of the fact that the place of destination, which was also where the eggs were to be consumed, was in Pakistan, a contract exclusively for the purposes of Pakistan.

In *Haripada Roy Choudhury and Another v. Province of East Bengal and Another* (Pak. L.R. (1953) 3 Dacca 541), decided on April 24, 1953, the High Court of Dacca (Civil Appellate), *held* (*per* Amin Ahmed and Badiuzzaman JJ.) that where a contract had been entered into before August 15, 1947, with the Province of Assam, by which the plaintiffs agreed to carry certain goods from a place which, after the partition of India, still remained in Assam, in India, to a place which after this partition was situated in the Pakistani province of East Bengal, and where this contract had been duly performed by the plaintiffs before the date of partition, the test of liability under the Indian Independence (Rights, Property and Liabilities) Order, 1947, should be assessed by the following criteria: (1) whether the contract was entered into before August 1947, (2) whether it was made on behalf of the Government of the Province of Assam, and (3) whether it was made for purposes which as from August 15, 1947, were exclusively for the use of Pakistan (by which was meant the Government of the Province of East Bengal, Pakistan), and if it satisfied these conditions the liabilities under the contract would accrue to the State in the territory of which lay the place of destination of the goods carried and delivered under the terms of the contract (which in this case was Pakistan).

See also *Jainaddi Choukdar and Others v. The Province of East Bengal* (Pak. L.R. (1954) 4 Dacca 228), decided by the High Court of Pakistan (Akbar J.) at Dacca (Civil Appellate), on February 1, 1954; *Union of India v. Chinubhai Jeshingbai* (Case No. 22 in this volume); *Chaman Lal Loona and Co. v. Dominion of India, New Delhi* (Case No. 23 in this volume); and *Ramesh Chandra Das v. State of West Bengal*, I.L.R. [1953] 2 Cal. 249 (to which reference is made in the Note appended to Case No. 23 in this volume).

State Succession—Liability for Contractual Obligations—Sale of Land to German Reich—Failure of Reich to Pay Purchase Price—Liability of German Federal Republic.

See Case No. 10 (*Sale of Land (Germany) Case*).

V.—Respect for Private Rights

Case State Succession—Private Rights—Effect Upon Power of
No. 25 Attorney Granted to a Consul of Predecessor State.

In re AMEYUND.

United States, Surrogate's Court, Kings County, New York.
November 23, 1951.

THE FACTS.—The Consul-General of the Netherlands in New York City petitioned to revoke letters of administration which had been granted to Willa Ramseur Ameyund for the estate of Rejda Ameyund. His petition recited that he was the attorney-in-fact and designee of one Noeriah, widow of the decedent and a resident of the Netherlands East Indies, and a citizen of the Netherlands. Noeriah had executed a power of attorney in 1947 in Java, designating the petitioner to receive letters of administration upon the estate of the decedent. The respondent, Willa Ramseur Ameyund, moved to dismiss the petition upon the ground, among others, that the petitioner lacked authority to institute such proceedings.

Held: that the respondent's motion must be denied. The Court said:

"The petition was filed in this Court on July 22, 1949, but jurisdiction of the respondent was not obtained until April 17, 1951. On December 27, 1949, by Treaty, Indonesia, of which Java is a part and wherein Noeriah resides, became a sovereign republic united in a Union with the Kingdom of the Netherlands. It is the respondent's contention that this change in the sovereignty of Java *ipso facto* resulted in the revocation of the power of attorney, as Noeriah is alleged to be a citizen of Indonesia. That contention might be tenable if the Consular [*sic*] General were proceeding under a treaty-power-of-attorney and if Noeriah did in fact become an Indonesian citizen by the mere change of territorial sovereignty, of which there is no proof.

"Neither Noeriah nor the Consul-General of the Indonesian Republic at New York City have repudiated or revoked the power of attorney granted herein. The absence of such action upon their part would tend to indicate that the Netherlands Consul is acting within not only the terms of the power of attorney but also within the treaty provisions between his country and Indonesia: *Hamilton v. Erie R.R. Co.*, 219 N.Y. 343, 349, 114 N.E. 399. That viewpoint is further sustained by the statement that the Indonesian Consul has agreed to recognize all actions instituted by the Netherlands Consul prior to the change of sovereignty and that he is acquainted

with the facts in the proceeding. In addition the terms of the power creating the agency do not fix or condition its duration by the period of simultaneous continuity of identical citizenship between the principal, Noeriah, and her agent, the Netherlands Consul. The burden of proving a revocation or other termination of an agency is on the party asserting it: *Michaelyan, Inc., v. New Jersey Fidelity & Plate Glass Inc. Co.*, 229 App. Div. 123, 241 N.Y.S. 142. The burden has not been sustained by the respondent.

"The construction of a power of attorney given to a Consul, is governed by the same principles of law applicable to a Consul's treaty-created power-of-attorney, that is 'according to the natural meaning of the words in view of the purpose of the agency and the needs to its fulfillment:' *Matter of Zalewski's Estate*, 292 N.Y. 332, 338, 55 N.E. 2d 184, 187, 157 A.L.R. 87. The power granted is to receive letters of administration upon the decedent's estate. Before that result may be attained, however, it is necessary that the respondent's letters be first revoked, wherefore the proceeding for that purpose is within the scope of the agency. The fact that Noeriah, a non-resident alien, cannot validly delegate to another the right to receive letters of administration, *Matter of Sorensen's Estate*, 195 Misc. 742, 91 N.Y.S. 2d 220, *Matter of Kassam's Estate*, 141 Misc. 366, 378, 252 N.Y.S. 706, affirmed 235 App. Div. 609, 255 N.Y.S. 836, does not deprive her of the right to institute other proceedings preliminary or incidental to the grant of such relief. Even if she petitioned for letters, her prayer would be granted to the extent of granting letters to the Public Administrator."

[Reports: 108 N.Y.S. 2d 326; 201 Misc. 547.]

**State Succession—Private Rights—Cession of Territory—
Rectification of Frontiers between Holland and Germany after
Second World War—Devolution of Property.** **Case
No. 26**

VAN OOSTVEEN *v.* VAN OOSTVEEN AND OTHERS.

Holland, District Court of Arnhem. July 7, 1951.

Court of Appeal of Arnhem. March 25, 1952.

Supreme Court. December 5, 1952.

THE FACTS.—On April 26, 1948, J. van Oostveen, a widower, of Elten (then in Germany), married H. Schmidt. On January 27, 1948, the parties had executed an "*Erbvertrag*" (settlement of inheritance) on the basis of separation of property, under which each secured to the survivor of them and until remarriage the administration and life-long irrevocable usufruct of their respective property. Elten lay in one of the strips of

territory which were transferred from Germany to the Netherlands in 1949. The Netherlands Law regarding Rectification of Frontiers of April 21, 1949 (*Staatsblad* No. J 180), and the Executive Decree thereunder of April 22, 1949 (*Staatsblad* No. J 181), came into operation on April 23, 1949. After van Oostveen's death on February 12, 1951, his two children by his first marriage contested the validity of the "*Erbvertrag*" of 1948 under Netherlands law, claiming for themselves their *pars legitima* under that law. The Executive Decree of April 22, 1949, regulated in great detail a large number of questions of civil and criminal law of a transitional or "inter-temporal" character, including (in Article 29) those concerning the devolution of property and the winding up of estates. Under that Article property was to devolve and estates were to be wound up according to Netherlands law, subject to a reservation keeping in force "*Erbverträge*" (which were unknown to Dutch law).

Held (by the District Court of Arnhem): that the claim of the children for their *pars legitima* must succeed against the claim of the widow under the "*Erbvertrag*". The case could be regarded in two different ways, either as being one of contract, or as one of succession. On the former view it would come under Articles 10 and 12¹ of the Decree regarding Rectification of Frontiers, which provided that contractual rights and vested rights acquired under previous legislation were to be respected. An "*Erbvertrag*" did not, however, belong to either of these categories of rights since it was not, according to German legal doctrine, a "*schuldrechtlicher Vertrag*" (a contract giving rise to obligations). It was rather a bilateral agreement between future spouses concerning the devolution of their property, which was legally effective only within certain limits and which, though irrevocable in principle, could, because of its *mortis causa* character, vest no rights in any person prior to the death of one of the spouses.

On the second view, which was the correct one, the case had to be decided on the basis of Article 29² of the Decree. This Article, in fact, maintained in force "*Erbverträge*" entered into before the transfer of the territory. This could, however, only be interpreted in the sense that contractual

¹ Article 10 provides as follows: "The coming into force of Netherlands law has no effect upon rights which have been acquired under the previous law."

Article 12 provides: "Rights resulting from contracts are governed by the law which was in force at the time of the conclusion of those contracts."

² Article 29 provides as follows:

"(1) Estates of persons dying after 6 a.m. on April 23, 1949, devolve and are to be wound up according to Netherlands law.

"(2) Settlements of inheritance which have been entered into before that moment remain in force."

agreements about the future devolution of property, though unknown to Dutch law, should nevertheless in principle remain in force, but not to the extent of allowing them to encroach upon mandatory provisions of Netherlands law, such as the rules providing for a *pars legitima* for children.

The decision of the District Court was upheld on appeal and on further appeal.

[Reports: *N.J.*, 1952, No. 291; *ibid.*, 1953, No. 34.]

NOTE.—This case, which contains elements of both public and private international law, is reported for two reasons. (1) It gives a practical example of the many questions regarding the concept of vested rights which arise on territorial transfers, respect for which rights is generally recognized as obligatory for the succeeding State. (Cf. the discussions on this subject in *Annuaire de l'Institut de Droit international*, Vol. 43 (1950), Part I, pp. 208 *et seq.*, and Vol. 44 (1952), Part I, pp. 181 *et seq.*). (2) It throws some light upon the interpretation given by a particular State to this general principle in its legislation on the subject, and also upon the attitude of the Courts towards such legislation. Each of the three Courts confined itself to interpreting the terms of the Executive Decree, without paying any attention to the possible existence of mandatory principles of international law which governed the subject and in the light of which the Decree ought to be construed.

**State Succession—Respect for Acquired Private Rights—Case
Legislation of Successor State in Violation of—Interpretation No. 27
of Municipal Legislation in the Light of International Law.**

NISYROS MINES CASE.

Greece, Council of State, First Section. 1952.

THE FACTS.—This was an appeal from a judgment of the Administrative Tribunal for Mines, rejecting a demand by the appellants for a declaration that they were entitled to exploit a sulphur mine, situated on the island of Nisyros in the Dodecanese, by right of succession to a transferee of the original concession. This concession was made in 1908 under the Ottoman Empire by an Imperial *Firman*. The appellants had filed an application for a renewal of the concession, under Article 22 of the Royal Decree of November 28, 1949, which dealt with the extension to the Dodecanese of Greek mining legislation. The Administrative Tribunal rejected the application on the ground that, although the appellants had lawfully succeeded to the rights of exploitation, these rights were abrogated by the Italian occupation authorities under a Law of October 1933.

Held: that the appeal must be allowed. Where municipal law confers authority to legislate for annexed territory, and

Case
No. 27
Contd.

there is doubt concerning the interpretation of the law, it must be construed in the light of the principles of public international law. The Court said:

"Article 2 of the Royal Decree of November 22, 1949, extending Greek mining legislation to the Dodecanese, provides that persons owning mining rights in the Dodecanese in accordance with international conventions, valid at the date of the occupation of the Dodecanese by Greek troops, should, within six months of the entry into force of the Decree, make any claims for renewal of their rights, accompanied by plans or other supporting documents. Those who do not submit their claims during the time-limit fixed are considered to have renounced their rights. The claims are considered by the Administrative Tribunal for Mines. In case of doubt the burden of proof of the existence of the right under laws formerly in force falls on the applicant. The acquired rights recognized as valid by the Administrative Tribunal will continue to be respected, but will remain subject to Greek law, except in so far as concerns the duration of the rights, which remains as originally fixed. Article 5 of the Italian Decree-Law of 1933 provides as follows:

'All concessions in favour of any person, granted whether by the Ottoman Government or the Italian Government, and relating to mines, unless it is shown that they have been regularly exploited during the period of five years immediately preceding the entry into force of this Decree, are considered null and void, without the necessity of any governmental act, and without any rights of the owners to repurchase. All rights and claims by the discoverers or exploiters of the mines are also declared null and void. These provisions apply, whatever the reasons for the failure to exploit, including the case of *force majeure* or Act of God, also the case where, for any reason, the mines conceded were not handed over to the concessionaires and the latter had not taken possession.'

The decision of the Tribunal recognizes that no regular exploitation of the mine in question took place from 1919 to 1945, and so the appellants were deprived of their rights in the mine, and the decision declares that, at the time of the occupation of the Dodecanese by Greek troops, such rights had ceased to exist according to the terms of the Italian Law. . . .

"The Italian military occupation of the Dodecanese continued until August 6, 1924, the date from which the Italian Decree of August 28, 1924, brought the Treaty of Lausanne into force. Under this Treaty the Dodecanese were annexed to Italy. By another Decree a Governor was appointed for the Dodecanese, who enacted the Decree of 1933 already quoted, repealing the Ottoman Law of 1908

concerning mines, and introducing, with suitable modifications, Italian mining legislation into the Dodecanese. The doctrine of international law, which has developed under the influence of Western civilization, recognizes that the sovereign right of a successor State is not limited to substituting its own legislation for that in force in the annexed territory, so far as acquired rights are concerned: for, as soon as the annexing State has established its sovereignty over the territory, it has the right to substitute its legislation in order to achieve consistency in its legislation as a whole. Nevertheless, in legislating concerning acquired rights, the successor State should deal with them on the basis of respecting them, in accordance with international agreements and with international usage. But, in any case where there is doubt on the question of the correct interpretation to be placed on a legal provision giving legislative power over annexed territory, being a doubt arising concerning the extent of such power, that provision should be construed in the light not only of the principles of public law of the State granting such power, but also subject to the general principles of international law. Article 5 of the above-mentioned Italian Decree of 1933 not only lays down rules for the future as regards rights in mines, but provides for the nullification of rights within a fixed time-limit. This provision is retroactive, and operates on acquired rights, and even excludes the case of *force majeure*. This provision is, therefore, contrary to the 1907 Hague Convention, which lays down legal rules which should be applied by custom, even in States which have not ratified the Convention. It also violates the rule laid down by Article 9 of Protocol XII of the Treaty of Lausanne, which was accepted and ratified by both Italy and Greece. This provides that, in the territories detached from Turkey by the Treaty, the successor State is substituted in all respects with regard to the rights and obligations of Turkey with regard to the nationals of other signatory Powers. The Court finds that, in enacting the provision in question, the Governor of the Islands exceeded the power conferred on him by the Italian Royal Decree of 1924, and that provision must, therefore, be considered a nullity. The judgment appealed from, which held that the appellants had been deprived of their rights in virtue of this provision, must be reversed. . . ."

[Report: *Revue hellénique de droit international*, 7 (1954), p. 274.]

IX.—Continuity of the Law. Judgments of Courts. Pending Actions

Case No. 28 **State Succession—Continuity of the Law—Private Inter-Regional Law—Netherlands Indies and Republic of the United States of Indonesia—Law as to Guardianship of Minors.**

In re X.

Holland, District Court of The Hague.

April 2, 1952.

THE FACTS.—After the transfer of sovereignty from the Netherlands to the Republic of the United States of Indonesia in 1949, application was made to a Netherlands Court for the appointment, normal in Dutch law, of a co-guardian for a minor of Dutch nationality who was domiciled in Indonesia. Under Indonesian law, private inter-regional law—as distinct from private international law proper—forms a special domain of legal relations between residents of different regions subject to the same sovereignty (such as may exist in a decentralized State, or between the mother-country and a colony). This private inter-regional law was particularly developed in the relations between the Netherlands and the Netherlands Indies.¹

The question to be decided, therefore, was which law applied: the law of the minor's nationality or that of his domicile. Under Article 6 of the Netherlands Law on General Principles of Legislation of 1826, the national law of the minor would apply. Under Article 16 of the corresponding Netherlands Indies Law of 1847 (maintained in force after December 27, 1949, as the law of the Republic of the United States of Indonesia), however, the law of the minor's domicile would apply. Before the transfer of sovereignty it was generally held by Netherlands Courts that in matters involving inter-regional relations between the Netherlands and the Netherlands Indies, the principle of domicile should prevail over the principle of nationality.

Held: that the application must be refused. The status of a minor of Dutch nationality domiciled in the Republic of the United States of Indonesia continued to be governed by the law of his domicile. The request for the appointment by the Court of a co-guardian under Dutch law could not, therefore, be granted; in Indonesia, as formerly in the Netherlands Indies, this appointment was made automatically by the

¹ On this complicated subject see Professor Kollewijn, "Le droit inter-régional privé du Royaume des Pays-Bas", in *Nederlands Tijdschrift voor Internationaal Recht*, Vol. 1 (1953-1954), pp. 269 *et seq.*

Weeskamer (a public body set up for the purpose some centuries before).

The Court said:

"Article 8 of the Netherlands-Indonesian Agreement on Transitional Measures of December 27, 1949, provides that:

'All stipulations in existing legal regulations and administrative ordinances, inasmuch as they are not incompatible with the transfer of sovereignty or with the provisions of the Union Statute, or of the present Agreement on Transitional Measures or of any other agreement concluded between the parties, remain in force without modification as regulations and ordinances of the Kingdom of the Netherlands and of the Republic of the United States of Indonesia respectively, as long as they are not revoked or modified by the competent organs of the Kingdom of the Netherlands or the competent organs of the Republic of the United States of Indonesia respectively.'

"As there is no reason to think that the maintenance of the existing rules on the conflict of laws would be 'incompatible with the transfer of sovereignty, . . . the Union Statute' or with any Convention between the Netherlands and Indonesia, those rules may be regarded as unchanged. It is possible that the contents of the rules were determined by the fact that previously no separate Indonesian citizenship existed side by side with Netherlands nationality. This does not, however, constitute a reason for setting aside the system of rules hitherto applied, since it is always possible, both in the field of relations governed by private inter-regional law and in the field of those governed by the rules of private international law, to give preference to the principle of domicile. A special reason for so doing exists in cases such as the present, in view of the desirability, in the absence of a definite legal principle and so long as possible, not to disrupt the continuity in the field of conflict of laws between the two countries."

[Report: *N.J.*, 1952, No. 599.]

State Succession—Continuity of the Law—Private Inter-Regional Law—Netherlands Indies and Republic of the United States of Indonesia—Law of Contract. Case No. 29

HAUSMANN *v.* KONINKLIJKE ROTTERDAMSE LLOYD.

Holland, District Court of Rotterdam.

May 16, 1952.

THE FACTS.—In March 1943, during the Japanese occupation of the Netherlands Indies, Hausmann lent the Surabaya branch office of the defendant, a Netherlands shipping company,

**Case
No. 29
Contd.**

the sum of 5,000 guilders. The agreement for the loan contained a clause stipulating repayment, at the option of the plaintiff, in Netherlands Indies currency, in dollars, or in pounds sterling, as soon as the defendant regained control of its assets in the Netherlands Indies. After the transfer of sovereignty from the Netherlands to the Republic of the United States of Indonesia, the plaintiff, then residing in Amsterdam, claimed repayment of the debt in the Netherlands, in dollars, or alternatively in Netherlands currency. The debtor refused to comply with this demand, on the ground that the repayment clause was void as infringing Indonesian currency regulations.

Held: that the action must fail. The foreign currency clause in the contract of loan was void under the relevant currency legislation of Indonesia, and the plaintiff was entitled to repayment in Indonesian currency only.

In 1943 the Netherlands Indies were occupied by Japanese forces, but sovereignty continued to belong *de jure* to the Netherlands. Both the Netherlands and Japan were States signatories of Hague Convention No. IV of 1907 and the Regulations respecting the Laws and Customs of War on Land annexed thereto. Under Article 43 of the Hague Regulations, Netherlands Indies law must therefore be held to have remained in force in the Indies during the war, and in fact it had remained in force until December 27, 1949, when sovereignty over the country was transferred to the Republic of the United States of Indonesia. The question whether, under these conditions, Netherlands or Netherlands Indies law applied to legal transactions which had connections with both the Netherlands and the Netherlands Indies must be answered in conformity with the rules of Netherlands inter-regional law.¹ Under this law a contract entered into between Netherlands subjects in the Netherlands Indies was regarded as governed by Netherlands Indies law. If the normal rules of private international law governed this case, it might perhaps be held that a Netherlands Court was not obliged to apply the currency legislation of another State, such legislation being in the nature of public law. In this case, however, there was no question but that private inter-regional law, not private international law, applied. Netherlands Courts, when dealing with the law of the Netherlands Indies, were not confronted with a law which had emanated from a sovereign power that was strange to them; the law emanated from the same sovereign power as that from which Netherlands law had emanated. A Netherlands Court was consequently under an obligation to apply Netherlands Indies legislation even when

¹ See the Note to Case No. 28 (*In re X.*).

this was in the nature of public law. There would be an exception to this obligation only if the application of Indonesian law should entail results contrary to the Netherlands *ordre public*, which was not the case here.

[Report: N.J., 1953, No. 427.]

NOTE.—See also *Heinemann v. Senembah Company*, decided by the Supreme Court on February 13, 1953 (to be reported in *International Law Reports*, 1953).

State Succession—Succession with regard to Punishment for Criminal Offences—The Law of Palestine.

**Case
No. 30**

ARAR v. GOVERNOR OF TEL MOND PRISON.

*Israel, Supreme Court, sitting as the High Court of Justice.
April 25, 1952.*

THE FACTS.—In the year 1947, at the time of the British Mandate over Palestine, the applicant had been convicted by the Court of Criminal Assizes of Palestine, sitting at Nablus, on a charge of murder, and had been condemned to death. His appeal was rejected in the same year by the Court of Criminal Appeals. The sentence had not been carried out by the time the Mandate came to an end. The applicant had escaped from Acre prison, in which he had been confined, but he was recaptured by the Israel police after the establishment of the State of Israel, and re-imprisoned. The President of Israel commuted the death sentence to one of fifteen years' imprisonment, and at the time of this application the applicant was serving that sentence in prison. The present application was for an order of *habeas corpus* on the ground that his continued imprisonment was unlawful. The applicant argued that since the original judgment had been given by the Court at Nablus in respect of an offence which had been committed in an Arab village which did not subsequently fall within the territory of the State of Israel, the State of Israel could not continue to act according to that judicial sentence. After the order *nisi* had been issued, the Court Rules (Adaptation Criminal Proceedings) Order, 1952, was promulgated. Regulation 2 thereof provided that a judgment which had been given in a criminal cause by a Court in Palestine after May 14, 1948, and which had not yet been executed, would be executed as if it had been rendered by a Court in Israel. A "Court in Palestine" is defined, in Regulation 1, as a Court which functioned in the territory under the Mandate for Palestine outside the area over which the law of Israel now applies.

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Held: that the order *nisi* must be discharged. The continued imprisonment of the applicant was lawful. The Court said :
“ It follows [from the 1952 Regulations] that the judgment which was rendered by the Court of Criminal Assizes at Nablus is executory as if it had been given by a Court in Israel. However, the question arises whether the Regulations of 1952 are valid. Those Regulations were promulgated by the Minister of Justice in virtue of powers conferred upon him by section 11 (b) of the Courts (Transitional Provisions) Ordinance, No. 11 of 1948. We are unable to accept the argument put forward by applicant's counsel that the said section 11 (b) applies to civil actions only, or to criminal causes having their origin in acts committed within the territory which is subject to the law of Israel. Section 11 (b) makes no distinction between civil and criminal causes, and it speaks simply of the execution of judgments generally, without taking into consideration the place in which the cause of action, in a civil case, arose, or in which the criminal act, dealt with in the judgment, was committed. The applicant is held today in prison as an escaped criminal and therefore there is no need for a new committal order. In addition, the judgment itself constitutes legal authority for his detention in prison.”

[Report: *Piskei-Din*, 6 (1952), p. 368.]

State Succession—Miscellaneous—International Organizations.

Case
No. 31

See Case No. 109 (*United Nations v. B.*).

G.—MISCELLANEOUS

Holy See—Position of—Lateran Treaty of February 11, 1929—Interpretation of—Italian Jurisdiction in Respect of Crimes Committed in the Vatican City.

Re Azzoli and Another.

Italy, Court of Cassation. May 10, 1952.

THE FACTS.—Azzoli was apprehended in the Basilica of St. Peter, within the Vatican City State, in the act of picking pockets. The Captain of the Papal Guard who arrested him handed him over to the Italian police, together with a letter from the Commander of the Guard explaining the circumstances. He was temporarily lodged in cells maintained by the Commissariat of Borgo, whence he escaped with the assistance of his jailer, the second appellant, Adriano. Adriano, who was convicted and sentenced to two months' imprisonment under Article 387 of the Italian Penal Code for having connived at Azzoli's escape from arrest, appealed on the ground, *inter*

alia, that Azzoli had not been under lawful arrest. The argument was founded on Article 202 of the Lateran Treaty of February 11, 1929, which provides that:

“ At the request of the Holy See, and on delegation of powers, which may be given by the Holy See either in single cases or permanently, Italy will provide . . . for the punishment of crimes committed within the Vatican City State. Where, however, a person who has committed a crime therein takes refuge in Italian territory, he shall be dealt with forthwith according to the provisions of Italian law . . . ”¹

It was contended that there had been no request for the prosecution of Azzoli within the meaning of this provision, and that he had not taken refuge in Italian territory within its terms.

Held: that the appeal must fail. There was in effect a request on the part of the Holy See for the prosecution of Azzoli, and he was a person who had taken refuge in Italy within the meaning of the Treaty. The Court said in part:

“ The appeal of the second defendant, Della Pietra Adriano, is groundless . . . By Article 22 of the Treaty between the Holy See and Italy, the Italian State is empowered and required to provide for the prosecution of crimes committed within the Vatican City State not only where there is a particular or general request and delegation of power in the matter on the part of the Holy See, but also where the accused has taken refuge in Italy. It is found that there was in the instant case an effective request and delegation within the meaning of this provision. Even if there were not, such request and delegation are unnecessary where the accused has taken refuge in Italian territory and thus where he is found in that territory in whatsoever circumstances. For, as this Court held in its decision in *Re Scholten*,² dated March 16, 1938, expressions such as ‘takes refuge in [our] territory’, ‘*réfugié*’, ‘*pays de refuge*’, employed in treaties, are equivalents of the expression ‘found within the State’ familiar in Italian law and used in Articles 9 and 10 of the Penal Code. That Article 22 of the Treaty applicable here is to be interpreted in this way is confirmed when it is recalled that the intention was to prevent persons committing crimes in the Vatican City State from being immune from prosecution in Italy and, at the same time, in the interests of swift justice, to dispense with the complex formalities of extradition. . . . ”

[Report: *Foro Italiano*, 1952, II, p. 169.]

The full text is reproduced in *A.J.*, 23 (1929), Supplement, p. 187.

¹ See *Annual Digest*, 1938-1940, Case No. 40.

PART III

STATE TERRITORY

A—IN GENERAL

II.—Acquisition of Territorial Sovereignty

v.—Conquest and Annexation

Annexation—Recognition of—Effect of Non-recognition—Non-recognition of Annexation of Estonia by Soviet Russia.

See Case No. 18 (*In re Niggol's Estate*).

Annexation—Effect on Nationality of Inhabitants of Annexed Territory—Annexation of Czechoslovakia by Germany—"Ethnic Germans" in Czechoslovakia—Compulsory Grant of German Nationality—Whether German Nationality Subsists after Recovery of Territory by Czechoslovakia.

See Case No. 56 (*German Nationality (Annexation of Czechoslovakia) Case*).

Annexation—Annexation of Austria by German Reich—Compulsory Acquisition of German Nationality by Austrian Nationals—Subsequent Entry of Austrian National into Service of Reich—Loss of Austrian Nationality by Entry into Service of "Foreign State" by virtue of Austrian Law—Whether Entry into Service of Reich Results in Loss of Austrian Nationality.

See Case No. 61 (*R. v. Provincial Government of Upper Austria*).

Territory—Subjugation—Purported Annexation of Occupied Territory before Termination of War—Effect on Nationality.

See Case No. 57 (*Kozuh v. Uff. Stato Civile di Milano*).

III.—Loss of Territorial Sovereignty

Case No. 32 Territory—Loss of—Absence of Final Determination of Status by Treaty of Peace—Treaty of Peace with Italy, 1947—Trieste.

In *Quaglia v. Caiselli*, decided on May 7, 1952, the Italian Court of Cassation followed incidentally its previous decisions¹

¹ See *Annual Digest*, 1949, p. 76 and *International Law Reports*, 1951.

to the effect that it was competent to hear appeals from decisions given by the Courts of Trieste prior to the entry into force of the Treaty of Peace with Italy: [*Mass. Foro Italiano*, 1952, p. 317].

In *Renzullo v. Faver*, the same Court *held*, on June 14, 1952, that so long as the provisional administration should continue, the Italian State, though it no longer had sovereignty in the area which it was intended should become the Free Territory of Trieste, continued to exercise, as a result of a delegation implicit in the Treaty, jurisdictional functions *via* the judicial organs utilizing Italian procedure which had earlier been sent up. Hence decisions of those organs given even after the entry into force of the Treaty were to be considered as Italian decisions, and appeal would lie from them in the circumstances provided for by Italian law: [*Mass. Foro Italiano*, 1952, p. 412].

In *Soc. Immobiliare Roma-Trieste v. Stabilimento Tipografico Triestino e Soc. Editrice del "Piccolo"*, decided on July 15, 1952, the same Court said: "The contention that the appeal does not lie, which was not pressed in the oral proceedings, is unfounded as this Court has, in decisions given since the pleadings were closed, adopted the position that, notwithstanding the entry into force of the Treaty of Peace, the Italian State, though it no longer has sovereignty in the area which it is intended shall become the Free Territory of Trieste, continues, for so long as the provisional administration shall continue to exist, to be invested with jurisdiction in that area as a result of an implicit delegation under the Treaty. This jurisdiction is exercised through the judicial organs previously set up and through the judges, who have not ceased to belong to the Italian judiciary and who continue to apply the Italian rules of procedure and, in general, the legal order formerly established. The Court has, likewise, recognized that judgments given in Trieste by the judicial organs referred to since the entry into force of the Treaty of Peace are to be looked upon as Italian judgments from which appeal lies according to the rules of Italian law": [*Rivista di diritto internazionale*, 1953, 460].¹

Territory—Loss of—Absence of Final Determination of Status by Treaty of Peace—Treaty of Peace with Italy, 1947—Tripoli. **Case No. 33**

In *Nicolò v. Creni*, decided on January 29, 1952, the Italian Court of Cassation had to deal not only with the admissibility of an appeal from a decision of the Court of Appeals of Tripoli delivered after the entry into force of the

¹ See also *C.E.A.T. v. Società Hungaria*, *International Law Reports*, 1951, Case No. 33.

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Treaty of Peace, but also with the situation resulting from the replacement of the Italian lira by occupation currency in Libya. The Court declared itself competent in the matter, and confirmed the decision of the Court below that a debt originally due in Italian lira was, after the conversion, to be paid in the new currency according to the rate of exchange between the two fixed upon the conversion, despite the later appreciation of the new currency. The Court said:

"In the decision of November 29–December 14, 1950, against which it is sought to appeal, the Court of Appeals of Libya, before staying execution, examined of its own motion the question of the admissibility of an appeal from a judgment delivered in Libya after the entry into force of the Treaty of Peace between Italy and the Allied and Associated Powers, signed at Paris on February 10, 1947. It decided the matter in the affirmative, following the principles laid down in the decision of this Court of August 26, 1950, anent similar appeals from Eritrean decisions.¹ Having regard to the irrelevance of events in Libya subsequent to its making, this ruling as to the admissibility of the appeal—or rather appeals, since more than one is involved—is to be confirmed. For, as has been said by this Court in decisions other than that referred to, namely, in the decision of March 15, 1951, with reference to an appeal from a judgment of the Court of Appeals of Trieste,² and in the decision of February 17, 1951, upon an appeal from the same Court of Appeals of Tripoli,³ Italy's loss of territory under the Treaty of Peace did not involve that she ceased to exercise jurisdiction, albeit merely during a transitional period, through the Courts previously established in the territories concerned. These Courts continued to belong to the Italian system of judicature, and in consequence appeal from their judgments lies to this Court. The fate which may have overtaken the territory in which a judgment is delivered is immaterial to the question of appellate competence. What is material is the nationality of the decision and of those concerned in it, or more particularly the national character of the system of judicature to which the judge whose decision is appealed from belongs. In so far as concerns the Italian possessions in Africa, Article 23 of the Treaty of Peace, implemented by Decree-Law No. 1430 of November 28, 1947, has provided that they shall no longer be under Italian sovereignty but shall remain subject to the existing order until their final destiny is determined pursuant to an agreement between the four

¹ See *Sorkis v. Amed*: *International Law Reports*, 1950, Case No. 24.

² *C.E.A.T. v. Società Hungaria*: see *International Law Reports*, 1951, Case No. 33.

³ *Farrugia v. Nuova Comp. Gen. Autolinee*: *International Law Reports*, 1951, Case No. 32.

Great Powers. Annex XI has provided for the contingency, which has in fact transpired, that such agreement should not be forthcoming and refers the matter in that event to the General Assembly of the United Nations, whose resolution the Powers concerned agree to accept and carry out. Hence, as this Court has repeatedly observed, the Courts of the colonial possessions retained their character as Italian organs after the entry into force of the Treaty of Peace in virtue of a temporary delegation to Italy resulting from the provision that those possessions should remain subject to the then existing system of administration pending their final disposal. In Libya in particular, which formed an integral portion of the metropolitan territory of the State, there has continued in operation the system of judicature established by Royal Decree-Law No. 70 of January 9, 1939, and justice has continued to be administered by Italian judges according to Italian law. Thus the decision appealed from, which was pronounced by the Court of Appeals of Tripoli on November 25, 1949, is without question an Italian judgment. Distinct from the question of the admissibility of the appeal, which as has been said is dependent solely on the Italian character of the decision which is challenged, is that of the competence of the Italian Courts to hear the cause at all. The transfer of territory may in fact affect the jurisdiction of a State and the competence of its judiciary as a whole to decide a particular matter, inasmuch as the necessary link between the matter and the Court may be destroyed, *e.g.*, by loss of nationality on the part of the defendant or the disappearance of some other of the conditions upon which, under Article 4 of the Code of Civil Procedure, jurisdiction depends. But in such a case, in view of the principle of *perpetuitio jurisdictionis* which Article 5 of the Code lays down, suits already pending are unaffected. For this reason the events of the most recent period of Libyan history have no influence on the instant matter. . . . The appellant further argued that the Court below had ordered payment in occupation liras rather than Italian liras, and that unit for unit despite the greater value of the former currency. This ground of appeal is inadmissible. The debt due to the respondent was due in Tripolitania and remained so due until September 15, 1943, when the Italian lira was replaced by the occupation lira, the conversion being made at par. Under Article 1277 of the Civil Code, the debt must be discharged in the new currency by payment of a sum equal to the value of that payable in the old. And, the new money not having any intrinsic value in terms of the old, the calculation of the sum now due must be effected by reference to the nominal value of each in terms of the other as established when the

**Case
No. 33
Contd.**

conversion was effected. Such is the meaning of Article 1277 of the Civil Code, which the Court below correctly applied since the conversion of Italian to occupation liras was made at par. . . .”

[Report: *Giurisprudenza Italiana*, vol. 1, Pt. 1, p. 473.]

IV.—Effects of Changes of Sovereignty

[See also PART II, E, State Succession.]

Effects of Changes of Sovereignty—Cession—Private Rights—Law of Devolution of Property.

See Case No. 26 (*Van Oostveen v. Van Oostveen and Others*).

VII.—Sovereignty Over the Air

i.—Air Navigation Conventions

Air Law—International Air Conventions—Effect on Nationals of Third Parties.

See Case No. 101 (*Glenn v. Compania Cubana de Aviacion, S.A., et Al.*).

B—PARTS OF STATE TERRITORY

I.—Boundaries

i.—Land Boundaries

Boundaries—Land Boundaries—Cession of Territory on Rectification of—Consequential Legislation.

See Case No. 26 (*Van Oostveen v. Van Oostveen and Others*).

II.—Rivers

iii.—International Rivers

(a) THE PRINCIPLE OF FREEDOM OF NAVIGATION ON INTERNATIONAL RIVERS

International Rivers—Freedom of Navigation—Navigation on the Rhine—Convention of Mannheim, 1868—Compulsory Membership of Shipowners' Organization as Obstacle to Freedom of Navigation—Right of Individual to Sue under Treaty.

**Case
No. 34**

BOON AND CHANTIERS NAVALS DU RUPEL *v.* STATE OF THE NETHERLANDS.

(RESTRAINT AT LOBITH CASE.)

Holland, District Court of The Hague. November 29, 1950.

Court of Appeal of The Hague. June 27, 1951.

Supreme Court. January 25, 1952.

THE FACTS.—On June 16, 1950, the tug-boat *Tromp*, owned and navigated by Boon, a Netherlands subject, and having in tow the Belgian vessel *Tilla*, which belonged to the Chantiers Navals du Rupel, while on her way from Dordrecht (Holland) to Duisburg-Ruhrort (Germany) was held up by the Netherlands customs authorities at the Dutch-German frontier near Lobith, on the ground that the owner was unable to produce a certain official declaration from one of the two organizations entrusted by the Minister of Transport with the control of freight traffic on the Rhine; the customs therefore refused a clearance certificate to enable the tug to continue her journey across the frontier into Germany. Boon and the Chantiers Navals, invoking the principle of freedom of navigation on the Rhine, sued the State for the loss which they suffered as a consequence of the refusal of the customs to let them continue their journey. The requirement of the production of the official declaration and the refusal by the customs authorities and by the Ministry of Transport to grant the necessary clearance were based on the provisions of (i) Decree No. 216/1940 of November 15, 1940, which was of a general nature and covered all international inland navigation from Holland into Belgium or Germany and which was enacted under the German occupation but "provisionally" maintained in force after the liberation of Holland by Decree E 93 of September 17, 1944, and (ii) two Executive ordinances, of May 13, 1948, and March 28, 1950, also concerning international inland navigation. These Decrees read together imposed serious restrictions on the freedom of navigation of the Rhine, which was protected by the Revised

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Convention of Mannheim of 1868. The Decree of 1940 imposed upon the owners of Rhine vessels the obligation of registering as members of one of two private organizations, empowered the Minister of Transport and the said organizations without more to enact directives for navigation on the Rhine, and obliged shipowners to conform with such directives. Detailed prescriptions, purporting to be based on this Decree, were contained in the Ministerial Ordinance of 1948, as modified by that of 1950.

Held (by the District Court): that the action must fail. The plaintiffs had no *locus standi*. In any event there had been no violation of the Convention. The Court said:

“ The Belgian plaintiffs could not derive from the Convention of Mannheim any right to sue the State of the Netherlands in a Netherlands Court. In any event the regulations of 1940, 1948 and 1950 were not contrary to the said Convention. Belgium was not among the Contracting Parties of the Revised Convention of Mannheim of 1868. Under Article 355 of the Peace Treaty of Versailles of 1919, to which in its turn the Netherlands were not a party, Belgium, along with Great Britain and Italy, obtained a seat on the Central Commission for Navigation on the Rhine. It was not necessary, however, to enter into an examination of the question as to whether Belgium could, in virtue of that fact alone, thenceforward derive rights from the Convention of Mannheim. For even if she could, there would be no legal grounds for allowing a Belgian subject, in his personal capacity, to sue the State of the Netherlands in a Dutch Court for damage caused to him by an illegal act committed by the State of the Netherlands in violation of the said Convention. Even if, for the sake of argument, the State of the Netherlands were to be found guilty of such a violation, this would only constitute an international delinquency of the Netherlands against its co-Contracting Parties (assuming again for the sake of argument that Belgium could be considered such a party after the Netherlands had acceded to the relevant Articles of the Treaty of Versailles by signing the Protocols of January 21, 1921, and March 29, 1923). The other Contracting Parties would certainly be entitled to call the Netherlands State to account for this international delinquency, with a view to recovering from it damages for any loss suffered by one or more of their subjects. But foreign nationals had no right of action against the Netherlands in its own Courts for an allegedly unlawful act committed by it.

“ As far as Boon was concerned, the Court must make the preliminary remark that reference to a principle laid down in the Convention of Mannheim, which was approved by a

Netherlands Act of Parliament, was a reference to a Treaty and a Law dating from the years 1868 and 1869, that is, from a period when regulations ordering the economic life of a country, such as have become an urgent necessity in present circumstances, were, if not entirely unknown, at least considered of so little importance that no attention was paid to them: certainly no account was taken of them when the principles of the Convention of Mannheim were formulated. In the course of years, however, economic conditions in the world have undergone changes of so important a nature—even leaving aside reasons of a political nature—that it has become essential for the Government, with a view to serving the general, not to say national, interest, to make all kinds of regulations applicable to the Rhine, without any direct bearing on free navigation on that river. The economic life of a country and the regulations enacted on its behalf have nowadays become respectively so wide in scope, and so sweeping, that provisions intended to operate in a particular field are necessarily bound to produce, or may easily produce, effects elsewhere which may prove to be inconvenient and troublesome for persons not directly interested. It does not follow, however, that such regulations must be regarded as unlawful so that in case of damage a claim for compensation arises. Suppose, to quote an example, that the fixing of very high coal prices in the Netherlands, necessitated by the stress of economic conditions, becomes so onerous for towing companies that they might be forced to abandon competition with foreign towing companies, would it be reasonable, on the sole ground of violation of an abstract principle formulated in former years by the Convention of Mannheim, to reproach the Government of an independent country for fixing such high prices? Present-day economic conditions, to take another example, frequently require persons engaged in various industries and occupations to register with or become members of a recognized body, failing which they will not be allowed to work in those industries or occupations. Would it not seem odd if, supposing that such a requirement were imposed upon shippers or shipowners in general, those navigating on the River Rhine would be exempt solely because the Mannheim Convention of 1868 recognizes the principle that ‘la navigation du Rhin sera libre; il ne sera apporté aucun obstacle, quel qu’il soit, à la libre navigation’, although this principle has nothing whatsoever to do with the control of industry? It must not be assumed that the Netherlands legislator, having concluded a treaty, by an oversight intended at a later stage to bring into existence other legal provisions which violated the principles of that treaty, nor may he be supposed to have called into existence new rules of law with

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the intention, which remained concealed for some eight or ten years, of violating the treaty. Such an assumption would only be permissible if the nature and the purport of the regulations were such as to reveal, as their only possible explanation, that the clear purpose of the legislator was to encroach upon the treaty. Since the purpose of the legal provisions concerned in this particular case clearly lies in the economic field and has nothing to do with freedom of navigation on the Rhine, there can be no question of violation of the Convention of Mannheim. The requirement that a shipowner be registered as a member of a particular organization impedes only the shipowner's freedom of entering or not entering into contracts; it does not hinder free navigation on the Rhine, especially when membership of the organization is subject to no conditions. The rule under which clearance inwards and outwards may be refused, on failure to produce to the Customs a compulsory declaration from one of the organizations, which also proves failure to become a member, is nothing more than the legal sanction imposed on the non-observance of a legal requirement."

The plaintiffs appealed.

Held (by the Court of Appeal): that the appeal must succeed. The Court said:

"The regulations in question are contrary to the Convention of Mannheim of 1868, which was approved by a Netherlands Law of April 4, 1869 (Staatsblad No. 37) and ratified by the Contracting Parties including the Netherlands. It was, consequently, incorporated into the national law of this country. That was also the case with the subsequent Protocols of Accession of the Netherlands to the Articles (356 *et seq.*) dealing with Rhine navigation in the Treaty of Versailles. The Belgian appellants could therefore derive personal rights of action against the Netherlands State from that Convention, and in particular from Article 1 thereof. The refusal of the customs officers, on the instructions of the Ministry of Transport, to clear the tug-boat *Tromp* outwards across the German frontier near Lobith on her journey from Dordrecht to Duisburg-Ruhrort was at variance with Article 1 of the Convention. It may be conceded that when the Convention was concluded in 1868 the Contracting Parties were probably not able to form a clear idea of the future social and economic development of their respective countries. It may also perhaps be conceded that certain measures, such as social provisions, price regulation and economic controls, which since that time have shown themselves as being generally considered necessary, can be regarded merely as necessary limitations put upon the freedom of contract and not as encroachments upon the

principle laid down in Article 1 of the Convention. The explanations given by the defendant State during the proceedings make it clear, however, that the very object of the regulations of 1948 and 1950 was to force Dutch owners of Rhine vessels to join an organization, by providing that a shipowner who was unwilling to be forced to join an organization could be prevented from crossing the Dutch frontier and, as a consequence, from continuing his journey into Germany on the free Rhine. This sanction is directly at variance with the freedom of navigation on the river. It does not fall under the exceptional measures expressly allowed in Article 1 of the Convention for the maintenance of general security, nor under the above-mentioned measures in the field of social legislation, price regulation or economic control which are generally considered necessary and which need not always be regarded as encroachments upon the freedom of navigation." [Report: *N.J.*, 1951, No. 437.]

The State of the Netherlands appealed.

Held (by the Supreme Court): that the appeal must fail. The Court said:

"The Ministerial Ordinances of 1948 and 1950 were null and void as far as Rhine navigation was concerned, and the refusal of a clearance certificate in the present case was unlawful. The first of the two conditions formulated by the Decree of 1940 in respect of participation in international inland navigation, namely, compulsory membership of one of the prescribed shipping organizations by the shipowner, did not in itself involve anything more than that the owner, before he could take part in certain shipping activities, must register with one of the organizations; a real encroachment upon freedom of navigation could therefore only result from the way in which the conditions for, or the consequences of, membership were regulated. The second of the two conditions, *viz.*, the obligation to submit to the prescriptions and directives to be given by the Ministry and the said organizations, did not contain any clear definition of what such prescriptions and directives might contain; the obligation created by the Decree could therefore only be construed as extending to prescriptions and directives which were in accord with existing laws and treaties. Consequently, the basic Decree of 1940 could not in itself be held incompatible with the Convention of Mannheim, so that there was no conflict between the Occupation Decree and the Convention.

"The implementation of the original Decree by the executive Ministerial Ordinances of 1948 and 1950, however, ran counter to the freedom of Rhine traffic which was assured by

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Article 1 of the Convention of Mannheim, since freedom of navigation can no longer be said to exist when the consent of an organization is required before permission is granted to make a journey on the Rhine, the purpose of that requirement being to ensure an equitable distribution of freight. It must be conceded that the question of which provisions are still compatible with the guaranteed freedom of shipping cannot be answered without taking into account the fact that in the course of time the law has gradually begun to concern itself with interests which, in the days when the Convention of Mannheim was concluded, still lay outside the province of the legislator, and also that a legal régime of a general character established for these purposes—even though its application necessarily makes its influence felt on the conditions under which navigation on the Rhine is conducted—is not necessarily to be considered as incompatible with the guaranteed freedom of navigation on the Rhine. In the present case, however, the regulations were exclusively concerned with international inland navigation and, as appears from the names of the prescribed organizations, with international Rhine traffic more especially; they do not only influence traffic conditions indirectly, they affect navigation directly. Even if the regulations concerned were indispensable for the Netherlands economy, they could still not be legally enacted as long as the Convention of Mannheim remains in force unaltered. Since, therefore, under the Decree of 1940, as modified by the Ordinances of 1948 and 1950, for a shipowner to become a member of one of the organizations mentioned would mean placing his ship under a system of control which is incompatible with the freedom of navigation guaranteed by the Revised Convention of Mannheim, it is not reasonable to require of a shipowner that he join such an organization."

[Report: *N.J.*, 1952, No. 125.]

NOTE.—This case, generally known as the "Restraint at Lobith" case, came before the Supreme Court shortly before the Netherlands Constitution was amended by the addition of Article 65, which provided that laws in force within the Kingdom which are incompatible with international conventions duly published in accordance with Article 66 of the Constitution, whether before or after the enactment of such laws, shall cease to have effect.

International Rivers—Freedom of Navigation—Navigation on the Rhine—Convention of Mannheim, 1868—Jurisdiction in Navigation Cases—Exclusive Jurisdiction of Rhine Navigation Courts. Case No. 35

THE VREDEBURG *v.* THE SARINA DORINA.

Holland, District Court of Rotterdam. December 17, 1952.

THE FACTS.—In November 1948, the tug-boat *Sarina Dorina*, while towing the barges *Margaretha I* and *Vredeburg* on the Rhine near Xanthen, in the British Zone of Germany, struck an obstacle in the river, causing two successive collisions. In July 1950, the owner of the *Vredeburg* brought an action against the owner of the *Sarina Dorina* in the District Court of Rotterdam, which is usually seised of Rhine navigation cases. The defendant pleaded to the jurisdiction of the Court on the ground that, this being a Rhine navigation case, the action, according to the Revised Convention of Mannheim of 1868, could only be brought in the German Court which had jurisdiction in the Xanthen region. According to Article 34 of that Convention "the Rhine navigation Courts have jurisdiction . . . : II. in civil matters, to adjudicate summarily on disputes concerning . . . (c) damage caused by skippers during the voyage or while mooring their vessels", and, under Article 35, such cases could only be heard by the Court exercising jurisdiction in the district where the damage was caused. The plaintiff conceded that Articles 34 and 35 are mandatory for cases of tort, so that if the collision was a tort and no more, the local German Court alone would be competent. He maintained, however, that this case was one of failure on the part of the tug-boat owner properly to carry out his contractual obligation and that, whenever the facts of a case fall within two legal categories—*i.e.*, tort as well as improper performance of a contract—the plaintiff has the choice between a German and a Dutch Court.

Held: that the plaintiff must fail; the Netherlands Court had no jurisdiction. The Court said:

"According to the argument of the plaintiff, a foreign Rhine Navigation Court may have concurrent jurisdiction with the national Court if the facts are of such a nature that they may found both an action based on tort and an action based on contract. On this view there were two courses open to the plaintiff: either (a) to present the case before the competent German Rhine Navigation Court by alleging a tort, or (b) to present it before a Netherlands Court by alleging improper execution of a contract. The Court rejects this theory as

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being incompatible with the scope of the Rhine Convention as a whole and with the general trend of its provisions, and as being contrary to historical development.

"In the first place, to accept the plaintiff's contentions would run counter to the unity of jurisdiction over the Rhine which was intended by the Convention. This intention finds its clear expression in the Articles establishing a Central Commission for Navigation on the Rhine, with the task, among other things, of acting as a central appellate court for the Rhine Navigation Courts. The published decisions of the Central Commission clearly show that it shares this opinion. It is true that this intended unity is impaired by the fact that under the Convention it is possible to appeal to national appellate courts and not only to the Central Commission. This duality of appeal was already known in earlier instruments concerning international navigation on the Rhine, and was explained by M. Walther (*La jurisprudence de la Commission Centrale pour la Navigation du Rhin*, Strasbourg, 1948) as "un compromis entre la susceptibilité nationale des Etats riverains et le système centralisateur de la Convention d'Octroi (one of the precursors of the Convention of Mannheim)". This inroad upon the principle of centralization, sanctioned by the Convention, was not, however, a basis on which to found a second duality, namely, of competence, as contended by the plaintiff. Article 34 (II) (c) of the Convention was not susceptible of the interpretation which the plaintiff sought to place on it. Moreover, history proved the growing importance of the judgments of the Central Commission. In the beginning, the work of the Rhine Courts was chiefly concerned with matters of navigation duties, port duties, etc. Disputes about the responsibility for collisions were then looked upon as of minor importance. But, as appears from the historical survey given by M. Walther (*op. cit.*, p. 9), the activities of the Central Commission in this field had in the course of time gradually increased with the intensification of traffic on the Rhine. This intensification also led to an increase in the importance of having uniform judicial decisions, and that was the purpose of the establishment of the Central Commission as a central court of appeal. In the light of this historical development, the plaintiff's contention, from which it would follow that a whole category of cases can be removed from the jurisdiction of the Rhine Navigation Courts by the mere fact of the plaintiff founding his action on a contractual relation instead of on a tort, would run counter to this development and for that reason must be rejected. Moreover, the Court could not, in the light of later historical development, attach much importance to the views of the Netherlands Legislature during the process

of parliamentary approval of the Convention of Mannheim, which was invoked by the plaintiff in support of his contentions. People in the Netherlands may then have entertained objections to the wide extent of the jurisdiction of the Central Commission and looked upon it with suspicion, but nowadays it is rather the opposite complaint that is voiced, *viz.*, that up to now a uniform adjudication of Rhine traffic cases has only been imperfectly realized. The interpretation put forward by the plaintiff would only increase this defect instead of diminishing it. If the plaintiff's contentions were to succeed, the result might be that foreign courts would be inclined to follow the same course as Netherlands courts, if and in so far as that might be permissible under their own codes of civil procedure. It would consequently promote diversity rather than uniformity of judicial decisions, contrary to the purpose of the Convention, a purpose which a Netherlands court is bound to apply directly as a rule of public international law binding upon it.

[Unreported.]

See also, for another aspect of this case, Case No. 108 in this volume.

PART IV

JURISDICTION

A—IN GENERAL.

TERRITORIAL AND PERSONAL

I.—Territorial

i.—Over Territory in General and Persons and Property Situated therein. Territorial Limits of Jurisdiction. Expropriation of Alien Property.

[See also PART II, STATES AS INTERNATIONAL PERSONS: A, IV, Recognition of Acts of Foreign States and Governments, and D, I and II, Recognition of States and Governments.]

**Case
No. 36**

Jurisdiction—Territorial Limits of—Order by Municipal Court Directing Cancellation of Alien Company's Rights under a Foreign Contract—Anti-Trust Legislation—Injunction to Prevent Compliance with Such Order—Requirements of Comity.

BRITISH NYLON SPINNERS LTD. *v.* IMPERIAL
CHEMICAL INDUSTRIES LTD.

England, Court of Appeal.
(Evershed M.R., Denning and Romer L.JJ.)
October 16, 1952.

THE FACTS.—On December 31, 1946, the defendants, Imperial Chemical Industries Ltd., made an agreement with an American Corporation, du Pont de Nemours & Co. Inc., by which it was agreed, *inter alia*, that du Ponts should assign to the defendants certain nylon patents and applications for patents set out in a schedule to the agreement.

On March 4, 1947, the defendants entered into a contract with the plaintiffs, an English company in which the capital was held in equal shares by the defendants and by Messrs. Courtaulds Ltd. By this contract the defendants agreed to grant to the plaintiffs exclusive licences to practise within a defined field all the inventions covered by the patents and applications for patents set out in the schedule to the agreement between the defendants and du Pont de Nemours.

In June 1952, the plaintiffs asked the defendants' Solicitors to execute formal licences under the assigned patents to enable

the plaintiffs to register them, but were told that, because of legal proceedings in the United States, the defendants were not able to comply with the request.

On July 30, 1952, in the United States District Court of New York, his Honour Judge Sylvester J. Ryan delivered final judgment in an action by the United States against Imperial Chemical Industries Ltd., du Pont de Nemours Inc. and others, under the Sherman Anti-Trust Act. By a clause in that judgment the United States Court ordered that the agreement of December 31, 1946, between Imperial Chemical Industries Ltd. and du Pont de Nemours Inc. be cancelled, and that Imperial Chemical Industries Ltd. should within ninety days reconvey all the patent rights assigned to them under that agreement. Other clauses in the judgment forbade any disposition of foreign patents by the defendants unless they obtained from the grantee an undertaking in writing to hold licences subject to the right of American manufacturers to import goods manufactured under the patents freely into any foreign country.

The plaintiffs claimed declarations of their rights in the licences, an order that the defendants execute formal grants of these licences, and for specific performance of the contract of March 5, 1947; they also asked for an injunction to restrain the defendants from assigning or dealing with or parting with any of the patent rights in accordance with the order of the United States Court. On August 13, 1952, Upjohn J. granted an interlocutory injunction to restrain the defendants from assigning the patents until judgment or further order.

The defendants appealed.

Held: that the interim injunction be continued and the appeal dismissed. The effect of the order of the United States Court was to destroy or qualify rights under an English contract vested in an English national who was not subject to the jurisdiction of the United States Court. The English Court would not recognize such extraterritorial jurisdiction and would intervene to restrain the defendants from obeying the order of the United States Court.

Evershed M.R., after stating the facts, said: " This is an interlocutory matter, and, therefore, it is inappropriate for the Court to say more about the case, or the merits of the case, than is necessary to make clear the grounds of the conclusion which it reaches. It is plain that there is here a question of the comity which subsists between civilized nations. In other words, it involves the extent to which the Courts of one country will pay regard and give effect to the decisions and orders of the Courts of another country. I certainly should be the last to

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indicate any lack of respect for any decision of the district Courts of the United States. But I think that in this case there is raised a somewhat serious question, whether the order, in the form that it takes, does not assert an extraterritorial jurisdiction which the Courts of this country cannot recognize, notwithstanding any such comity. Applied conversely, I conceive that the American Courts would likewise be slow (to say the least) to recognize an assertion on the part of the British Courts of jurisdiction extending (in effect) to the business affairs of persons and corporations in the United States.

“ Having said that much, I must make one reference to a passage in the second of the opinions which his Honour delivered, dated May, 1952. It is plain that the Judge considered this matter most carefully, and indeed, as Upjohn J. pointed out, expressed his own doubts whether, in giving effect, as he felt it his duty to do, to the implications of the Sherman Act, he might not be going beyond the normally recognized limits of territorial jurisdiction. He said: ‘ It is not an intrusion on the authority of a foreign sovereign for this Court to direct that steps be taken to remove the harmful effects on the trade of the United States ’. If by that passage the Judge intended to say (as it seems to me that he did) that it was not an intrusion on the authority of a foreign sovereign to make directions addressed to that foreign sovereign or to its Courts or to nationals of that foreign Power effective to remove (as he said) ‘ harmful effects on the trade of the United States ’, I am bound to say that, as at present advised, I find myself unable to agree with it.

“ Questions affecting the trade of one country may well be matters proper to be considered by the Government of another country. Tariffs are sometimes imposed by one country which obviously affect the trade of another country, and the imposition of such tariffs is a matter for the Government of the particular country which imposes them. And if that observation of the Judge were conversely applied to directions designed to remove harmful effects on the trade, say, of Great Britain or British nationals in America, I should myself be surprised to find that it was accepted as not being an intrusion on the rights and sovereign authority of the United States.

“ On the other hand, there is no doubt that it is competent for the Court of a particular country, in a suit between persons who are either nationals or subjects of that country or are otherwise subject to its jurisdiction, to make orders *in personam* against one such party—directing it, for example, to do something or to refrain from doing something in another country affecting the other party to the action. As a general proposition, that would not be open to doubt. But the plaintiffs in

this case (unlike Imperial Chemical Industries) are neither subjects nor nationals of the United States, nor were they parties to the proceedings before his Honour, nor are they otherwise subject to his jurisdiction.

“What the precise relationship, commercially or otherwise, is between the plaintiffs and the defendants we have not at this stage of the proceedings considered at all, and I proceed on the assumption (and I am not to be taken as hinting that the contrary is the fact) that the plaintiffs are an independent trade corporation and entitled to be treated as independent of Imperial Chemical Industries Ltd. Being so independent, they have beyond question, according to the laws of England, certain rights, certain choses in action, by virtue of the contract of 1947, which the Courts of this country, in pursuance of the laws which the Courts of this country claim to be entitled to administer, will in this country protect and enforce. Broadly, the right which they have may be described as their right under the contract, being an English contract made between English nationals and to be performed in England, to have it performed and, if necessary, to have an order made by the Courts of this country for its specific performance. That is a right—it might be said, a species of property, seeing particularly that it is related to patents—which is English in character and is subject to the jurisdiction of the English Courts; and it seems to me that the plaintiffs have at least established a *prima facie* case for saying that it is not competent for the Courts of the United States or of any other country to interfere with those rights or to make orders, observance of which by our Courts would require that our Courts should not exercise the jurisdiction which they have and which it is their duty to exercise in regard to those rights.

“But I think that the matter goes somewhat further. The subject-matter of the contract of December, 1946, is a number of English and Commonwealth patents. An English patent is a species of English property of the nature of a chose in action and peculiar in character. By English law it confers certain monopoly rights, exercisable in England, on its proprietor. A person who has an enforceable right to a licence under an English patent appears therefore to have at least some kind of proprietary interest which it is the duty of our Courts to protect. And, certainly so far as the English patents are concerned, it seems to me, with all deference to his Honour's judgment, to be an assertion of an extraterritorial jurisdiction which we do not recognize for the American Courts to make orders which would destroy or qualify those statutory rights belonging to an English national who is not subject to the jurisdiction of the American Courts.

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“ As regards the patents other than the English patents—Australian, Indian, New Zealand, South African, Irish or other—a possible distinction can, of course, be drawn, since the patents in those countries are a species of property in those countries, and an effective right to use those patents would, if necessary, have to be asserted in those countries. But no special point has been made before us as regards those Australian and other non-English patents; and, indeed, for present purposes I do not understand that it is suggested, if the injunction goes as regards the English patents, that it should not go to the full extent of the patents in the schedule. We must, in the absence of some evidence to the contrary, assume that the law in these other countries is the same as it is here; and, as I have already said, apart from what I might call the particular rights quoad the particular non-English patents, there remains the general contractual right which relates to all the patents and is derived from the English contract of December 1946.

“ I think it undesirable that I should say more, except to reaffirm the proposition that the Courts of this country will, in the natural course, pay great respect and attention to the superior Courts of the United States of America; but I conceive that it is none the less the proper province of these Courts, when their jurisdiction is invoked, not to refrain from exercising that jurisdiction if they think that it is their duty so to do for the protection of rights which are peculiarly subject to the protection of the English Courts. In so saying, I do not conceive that I am offending in any way against the principles of comity which apply between the two countries; and, like Upjohn J. I take some comfort from the doubts which Judge Sylvester Ryan himself entertained about the extent to which this order might, if carried to its logical conclusion, go.

“ One final word: I suggested to Mr. Winn that it might be right to include in the order some express reservation of the defendants’ right to apply to discharge the injunction if some change took place in the circumstances, particularly if some steps of a penal character were taken against the defendants in the American Courts. But, on reflection, it seems unnecessary to make any addition to the order to that effect, for the order is (as all interlocutory orders of this kind are expressed to be) only ‘ until judgment or further order ’. It will therefore, I think, suffice to say that in dismissing this appeal (as in my judgment we should) we do not in any way prejudice the right of the defendants, if any of the events that I have indicated should occur—and there is no evidence before us as to what might happen—to apply to the Judge for a discharge of the injunction, either as to the whole of the subject-matter

of the agreement of December, 1946, or as to some of the patents—for example, the non-English patents—or otherwise as they may be advised.”

Denning L.J. said: “I agree. It would be a serious matter if there were a conflict between the orders of the Courts of the United States and the orders of these Courts. The writ of the United States does not run in this country, and, if due regard is had to the comity of nations, it will not seek to run here. But, as I read this judgment of the United States Court, there is a saving clause which prevents any conflict, because although Imperial Chemical Industries has been ordered to do certain acts by the United States Court, nevertheless there is a provision which said that nothing in the judgment shall operate against the company for action taken in complying with the law of any foreign Government or instrumentality thereof to which the company is for the time being subject. With that saving clause, I hope that there will be no conflict between the orders.”

Romer L.J. said he agreed and had nothing to add.

[Report: L.R. [1953] 1 Ch. 19.]

ii.—Criminal Jurisdiction over Foreigners

Jurisdiction—Over Aliens for Crimes Committed Abroad—Effect of Subsequent Acquisition of Nationality.

See Case No. 48 (*X. v. Public Prosecutor*).

viii.—Exemptions from and Restrictions upon Territorial Jurisdiction

(a) FOREIGN STATES

[See also PART II, STATES AS INTERNATIONAL PERSONS: A, II, Sovereignty and Independence: iii, Conduct of Foreign Relations. Conclusiveness of Statements of the Executive.]

Jurisdiction—Immunity from—Foreign States—Property Deposited with Bailee—Whether Still in Possession or Control of State—Acts Inconsistent with Bailment—Action *in personam* against Bailee.

Case
No. 37

UNITED STATES OF AMERICA AND REPUBLIC OF FRANCE *v.*
DOLLFUS MIEG ET CIE S.A. AND BANK OF ENGLAND.

England, House of Lords.

(Earl Jowitt, Lords Porter, Oaksey, Radcliffe and Tucker.)
February 25, 1952.

THE FACTS.—This was an appeal from the Court of Appeal.¹ The Bank of England held, for safe custody, sixty-four numbered

¹ For the previous proceedings in this case, *sub nomine Dollfus Mieg et Cie S.A. v. Bank of England*, and for a full statement of the facts, see *Annual Digest*, 1949, Case No. 36.

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bars of gold which in 1944 had been forcibly and wrongfully removed by German troops from a French bank then holding them on behalf of Dollfus Mieg et Cie S.A., a French company. The bars were eventually recovered in Germany and lodged with the Bank of England by the Governments of the United Kingdom, France and the United States for safe custody pending their ultimate disposal.

The company brought an action against the Bank of England claiming delivery of the bars, an injunction restraining the Bank from parting with possession of them otherwise than as directed by the company and, alternatively, damages.

The Bank applied by motion to have the writ set aside and all subsequent proceedings in the action stayed on the grounds that the bars were in the possession or control of the three Governments, and that the action impleaded two foreign sovereign States which declined to submit to the jurisdiction of the Court. The company moved the Court for an interlocutory order to restrain the Bank from parting with the bars.

On appeal from Jenkins J., who had ordered all further proceedings in the action to be stayed, there was produced before the Court of Appeal further evidence on behalf of the Bank, from which it appeared that it had been discovered that between December 30, 1948, and January 26, 1949, and after the issue of the writ in the action, thirteen of the gold bars had been sold by mistake. Although the bars had been segregated pending directions from the three Governments as to their disposal, it appeared that a warning notice had not been attached to the cards which constituted the record of the bullion office of the Bank, and that consequently the thirteen bars had been sold by an official in that office. On these further facts the Court of Appeal allowed the appeal from Jenkins J. ordering the Bank's motion to be discharged and giving the company leave to apply for an injunction in respect of the fifty-one remaining bars: *Dollfus Mieg et Compagnie S.A. v. Bank of England* ([1950] Ch. 333).

Then the Bank applied to the Court of Appeal for the postponement of its order, to enable the Governments of the United States of America and the Republic of France to be joined as defendants in the action. This application was refused but after further proceedings the two Governments were joined as defendants to the action. On November 3, 1950, the Governments moved Romer J. for a stay of all further proceedings in the action, or, alternatively, of all such further proceedings as related to the remaining fifty-one bars. He dismissed the application and the Court of Appeal

affirmed his decision. The Governments appealed to the House of Lords.¹

Held (unanimously): that the decision of the Court of Appeal must be varied. The fact that thirteen of the gold bars had been sold by mistake could not affect the issue with regard to the remaining bars. Accordingly: (i) the action must be allowed to proceed in respect of the thirteen bars sold by the Bank, as the Bank had by its own act terminated the bailment of these thirteen bars; (ii) the action must be stayed in respect of the remaining fifty-one bars, since the doctrine of immunity applied to a claim to recover property in the hands of a bailee for a foreign sovereign; and, further, because there was no jurisdiction to order the bailee to pay damages for conversion, since the bailee would thereby acquire the title to the property so as to enable it to set up this title against the foreign sovereign bailor.

Earl Jowitt, after stating the facts in detail, said:

“Dollfus Mieg appealed to the Court of Appeal, and before the conclusion of the hearing in that Court the fact that by some error thirteen of the sixty-four bars had been delivered on the market was revealed. I have not overlooked the fact that the disposal of the thirteen bars did not take place until after the issue of the writ. This difficulty could have been surmounted by the issue of a further writ after January 26, 1949, and all the parties have asked us to treat the case as though the writ had been issued on the later date. My Lords, it is, I think, clear that so treating the date of the writ the action in regard to these thirteen bars must be allowed to proceed, for in regard to them it may well be argued that no question any longer arises of interfering with the possession or control of a foreign sovereign State. I do not think it would be proper for us to come to any final conclusion as to this matter. It is not for us to try the case. We have merely to decide at this stage whether the action should or should not be allowed to go for trial, and in so far as the thirteen bars are concerned I certainly think that the action should be allowed to go on. All the members of the Court of Appeal thought, however, that the disposal of the thirteen bars made it inevitable that the action should be allowed to proceed as to the entire sixty-four bars. The Master of the Rolls [1950] Ch. 333, 344, thought that the disposal of the thirteen bars had ‘destroyed at a single blow the whole premiss on which the judgment below proceeded’. Somervell L.J. would have agreed with the judgment of Jenkins J. but for the disposal of the thirteen bars. He

¹ It is not possible here to report the very valuable arguments by counsel in this case; for a full summary see L.R. [1952] A.C. pp. 584-597.

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states his view as follows (*ibid.* 364): 'The sixty-four bars for all relevant purposes at all material times were in the pool. Thirteen of them were disposed of, and the whole sixty-four might have been disposed of without instructions from or reference to the Tripartite Commission. In these circumstances it seems to me impossible to hold that these sixty-four bars were in the possession or control of the three Governments'. Cohen L.J. agreed with Somervell L.J. My Lords, I cannot agree with this reasoning. If the bars were in the possession or control of the Governments I cannot think that the fact that by some error of internal management thirteen bars were disposed of alters the position except as to those thirteen bars. For the question of possession or control must depend on the terms of the contract under which the bars in question came to the Bank; if possession or control was retained by the Governments that position is not altered by the fact that through an error thirteen bars were disposed of in breach of the contract. Unless the disposal of the thirteen bars throws some light upon the terms of the contract it seems to me to be irrelevant in regard to the remaining fifty-one bars. I have already stated my view that in regard to the sixty-four bars there was a contract of bailment and an obligation was thereby imposed on the Bank to keep these bars separate and intact and not to allow them to become merged in the general pool of customers' gold pending the receipt of further instructions. The Master of the Rolls, differing in this respect from the other Judges in the Court of Appeal, thought that Jenkins J. had come to an erroneous conclusion on the facts as presented to him. He thought that from and after the time at which the sixty-four bars were delivered to the Bank the Governments no longer had such a degree of possession or control as would justify them in asking to have the action stayed.

"After the decision of the Court of Appeal had been given, and in view of the then contemplated appeal to your Lordships' House, the two foreign Governments applied to be added as defendants to the action. An order was made that they should be so added, with the result that we have had the advantage of hearing counsel on their behalf as well as counsel for the Bank of England in support of the appeal.

"My Lords, I think that the question for our decision is whether the foreign Governments, notwithstanding the delivery of the sixty-four bars to the Bank of England, still retain such an interest in the bars as to entitle them to have the action stayed.

"The decided cases which illustrate the way in which the principle of immunity has been applied by our Courts are largely concerned with ships and actions *in rem*. Lord Wright in

Compania Naviera Vascongado v. The Cristina [1938] A.C. 485, 510, refers with approval to the observations of Sir Hardinge Giffard S.-G. in his argument on *The Parlement Belge* (1880) 5 P.D. 197, 202: 'The privilege depends on the immunity of the sovereign, not on anything peculiar to a ship of war, though it seldom arises as to anything else, because hardly anything belonging to a sovereign in his public capacity, except a ship of war, ever goes wandering into the jurisdiction of foreign Courts'. In his judgment in *The Parlement Belge* 5 P.D. 197, 214-5, Brett L.J. deduces the following principle from the decision of the English and United States cases: 'The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction'. In that case the Belgian Government was the owner of the ship: 'But the rule is not limited to ownership. It applies to cases where what the Government has is a lesser interest, which may be not merely not proprietary but not even possessory', *per* Lord Wright, *The Cristina* [1938] A.C. 485, 507. Lord Atkin stated the principle in the following terms (*ibid.* 490): 'The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the Courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is, in my opinion, well settled that it applies to both.'

"My Lords, I think it probable that Lord Atkin inserted the words 'or control' in his second proposition so as to make it

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wide enough to cover those cases which had been cited to him in argument in which the foreign Government had requisitioned or directed a ship without depriving the owners of their possession. This is, I think, merely an illustration of one of those interests lesser than a proprietary interest or even than a possessory 'interest' to which Lord Wright referred; there is, I think, no special doctrine applying to ships which does not equally apply to gold bars.

"We were pressed in argument with the difficulty which might arise if it were alleged that a foreign sovereign whilst in this country seized goods in this country without any legal justification and then made a bailment of such goods to a private person within the jurisdiction. We are not dealing with any such case at present and I should prefer not to make any pronouncement in regard to such a case. In the present case the foreign Government had undoubtedly been in possession of the gold bars before they were sent to this country. They decided in the public interest to send these gold bars to the Bank of England in London. In my view the Bank became bailees of these bars and were bound to keep them intact pending further instructions.

"In the case now before us the action is an action *in personam* and not an action *in rem*. I do not think that the foreign Governments can be said to be directly impleaded; neither do I think they are being indirectly impleaded, for the present action is an action *in personam* brought against the Bank of England.

"The word 'control' in the second limb of Lord Atkin's proposition is a word of vague import, and I think it fallacious to treat Lord Atkin's words as though they were the words of a statute. I do not think that the word 'control' is apt in the present context. The bars of gold did not require any treatment or anything in the nature of management. All that was required was that they should be left intact and undisturbed in the vaults of the Bank.

"Under these circumstances I think we should consider whether the foreign Governments had such a possessory right in relation to the gold bars as to entitle them to ask that this action should be stayed. Under English law, where there is a simple contract of bailment at will the possession of the goods bailed passes to the bailee. The bailor has in such a case the right to immediate possession, and by reason of this right can exercise those possessory remedies which are available to the possessor. The person having the right to immediate possession is, however, frequently referred to in English law as being the 'possessor'—in truth the English law has never worked out a completely logical and exhaustive definition of 'possession'.

We are bound to decide this case in accordance with the English law and we have no evidence of any other system of law; yet it is germane to remember that the English law has incorporated the doctrine of State immunity from international law. It would be an unsatisfactory position if the extent and ambit of this doctrine were to depend on the special and peculiar doctrines of each jurisdiction in relation to 'possession', with the result that differing results might be arrived at according to whether the case was governed by English law or, for example, by Scottish law. The basis of the rule was explained by Lord Atkin in the case of *Government of the Republic of Spain v. The Arantzazu Mendi* [1939] A.C. 256, 265, as being intended either to secure reciprocal rights of immunity or to avoid the risk of injured pride if jurisdiction is sought to be exercised, or to avoid the risk of belligerent action if Government property is seized or injured; and the distinction between 'possession' and the 'immediate right to possession' would have no bearing upon these considerations.

"I agree with Jenkins J. in thinking that the fact that the foreign Governments had the immediate right to possession of the sixty-four bars made it impossible, consistently with the established principle of English law relating to State immunity, for relief to be given in this action by ordering the delivery up of the bars or by granting an injunction restraining the Bank from parting with their possession; for if either of these courses were taken it would be necessary for the foreign Governments to take proceedings in this country if they wanted to recover the gold here.

"The doctrine of immunity should not, I think, be confined to those cases in which the foreign sovereign was either directly in possession of property by himself or at least indirectly by his servants, for if it were so confined the doctrine would not be applicable to the case of any bailment. I can find nothing in any decided case to support any such limitation. We have been referred to certain American cases, which I have considered with care, but I do not think that any of these cases affords any justification for such a limitation of the doctrine of sovereign immunity as is here sought to be introduced.

"Jenkins J. in the course of judgment, to which I would desire to express my indebtedness, expresses the matter as follows [1949] Ch. 369, 389: 'A foreign sovereign State (unless embodied in a personal sovereign visiting this country) cannot, so far as I can see, be in actual physical possession of property here otherwise than by its servants. Accordingly, if actual physical possession by a foreign sovereign State were essential to immunity on the score of possession by such State, immunity on that ground could only be claimed in respect of property in

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this country in the actual physical possession either of some personal sovereign or of a person who could be shown to be in the strict sense a servant of a foreign sovereign State (as to make his possession that of his master) or else to be himself entitled to diplomatic immunity. The application or exclusion of the principle of immunity would thus be made to depend on nice distinctions respecting the particular mode in which a foreign sovereign State might happen to exercise dominion over property brought by it to this country in its possession or control. For instance, if gold were brought to this country by a foreign sovereign State to be applied in the purchase of goods for the public purposes of that State and placed in the hands of a servant of the State concerned to be applied in making such purchases in accordance with its directions, the gold would be protected by the principle of immunity on the score of possession by the foreign sovereign State, irrespective of any immunity from process the servant might be entitled to claim in his own person. If on the other hand gold brought to this country by a foreign sovereign State for similar purposes was deposited by it with a banker or other agent for safe custody and disposal in accordance with its directions, the gold would at once become exposed in the hands of the banker or other agent to any adverse claims there might be, and the principle of immunity would afford no protection from actions brought by third parties against the banker or other agent for the purpose of establishing such claims. I cannot think it would be right to make the application or exclusion of the principle of immunity (based as it is on substantial reasons of policy) turn upon nice distinctions of this kind.'

" Although I agree with the observations of Lord Maugham in *The Cristina* [1938] A.C. 485, 519, that the doctrine of immunity should not be extended, yet I think that we should unduly limit the doctrine if we were to decline to apply it to any bailment which might be made by or on behalf of the foreign sovereign in which the action is brought against the bailee. If it were so limited the result would be that if the foreign sovereign deposited his bag or his jewellery with the railway or with the hotel or with the bank, proceedings could be taken against the bailee, claiming the delivery of the article which had been deposited by or on behalf of that sovereign.

" It remains to consider whether the fact that the writ, by reason of the amendment, claims damages for conversion should be allowed to make any difference. The only act of conversion in respect of the fifty-one gold bars which can be relied upon is the fact that the Bank of England refused to deliver any of the gold bars which they were holding for the three Governments to the respondents. If the Bank were ordered to pay damages

representing the value of the gold bars, then, on payment, they would acquire the title of the respondents to the gold and could set up that title against their bailors, the three Governments. This would result in an interference with the rights of the three Governments, who would be obliged, if they wanted to recover the gold, to submit to the jurisdiction by starting proceedings as plaintiffs in our Courts. Moreover, if the Court cannot order the Bank to deliver the gold bars to the respondents, it is difficult to see how the Court can order the Bank to pay damages for not so delivering the gold bars.

“On the whole, therefore, I come to the conclusion that the action should be allowed to continue as to the thirteen bars only.

“With regard to the question of costs, I think that all orders already made as to costs should be allowed to stand and that in relation to any steps in these proceedings in which orders as to costs have not already been made, including this appeal and the previous application by the Governments to be joined as defendants, each party should pay their own costs.”

Lord Porter, after discussing the arrangement under which the Bank held the gold bars, continued:

“Had, then, the sixty-four bars remained intact, I find myself in agreement with the original judgment of Jenkins J.

“Does it, then, make a difference that in error thirteen bars were treated as if they were part of the pool from which gold could be drawn for customers generally instead of being treated as confined in use to one particular customer? The reason for the decision of the majority in the Court of Appeal is perhaps most clearly exemplified in the words of Somervell L.J. He says [1950] Ch. 333, 364: ‘The authorities of the Bank responsible for the correspondence with the Tripartite Commission intended that these bars should be kept apart from the pool and held as individual bars for the three Governments. Some steps were taken to this end, but, as the facts show and as is admitted, one necessary step was not taken. The sixty-four bars for all relevant purposes at all material dates were in the pool.’ My Lords, with all due respect, I am unable to concur with this view. In fact, the bars were kept separate in two trucks and a notice was placed on them to indicate that they were to be used only for a particular purpose. It is true that one precaution, *viz.*, an entry on the cards, which would have been helpful in avoiding a misuse of the bars and might have prevented it, was not taken, but that neglect did not cancel the instructions of the Tripartite Commission or the Bank’s acceptance of them. So long as the bars remained in the possession of the Bank, a failure to take all possible precautions or indeed even a failure to take all reasonable precautions to prevent the bars being dealt with in the ordinary course, is not effective to

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destroy the conditions on which the Bank were instructed to hold the bars and on which they agreed that the bars should be held. Misdelivery may in certain cases put an end to a claim to possession, though it will not in the normal case destroy a right of property. On the other hand, negligence in failing to take all possible steps to see that an arrangement which had been made is carried out does not alter the fact that all bars in the possession of the Bank remained in their possession subject to the terms upon which they were deposited. In such a case, however, misdelivery does, in my view, affect the position, since, as regards the thirteen bars, it can no longer be asserted that they are in the possession of the three Governments through their bailees, the Bank.

“ That the Bank are bailees is, I think, not open to doubt, but that fact leaves undecided the difficult and interesting question: Can these who assert a possessory title to goods but make no claim to the property in them be said still to retain possession after they have entrusted those goods to a bailee to hold on their behalf? There is no direct English authority which decides the point, much less one binding on your Lordships. The nearest, I suppose, is *Ancona v. Rogers* (1876) 1 Ex.D. 285, a decision on the words ‘ apparent possession ’ contained in section 1 of the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36). In delivering the judgment of the Court in that case Mellish L.J. said (*ibid.* 292): ‘ There is no doubt that a bailor, who has delivered goods to a bailee to keep them on account of the bailor, may still treat the goods as being in his own possession, and can maintain trespass against a wrongdoer who interferes with them. It was argued, however, that this was a merely legal or constructive possession of the goods and that in the Bills of Sale Act the word “ possession ” was used in a popular sense and meant actual or manual possession. We do not agree with this argument. It seems to us that goods which have been delivered to a bailee to keep for the bailor, such as a gentleman’s plate delivered to his banker, or his furniture warehoused at the pantehnicon, would, in a popular sense, as well as in a legal sense, be said to be still in his possession ’. It is urged, however, that these ‘ dicta ’ are obiter, and wrong; that, in any case, the judgment was not concerned with ‘ possession ’ as opposed to property and that the true view is that the rule applies only in a case where the bailor has the property and the bailee has the possession. In such a case it is maintained that the bailor can sue in right of his property but that an action in right of possession belongs to the bailee only. This contention may be true where the bailor has no right to demand an immediate return of the article at his will, but the better opinion is, I think, that where the bailor can at any

moment demand the return of the object bailed, he still has possession. See Pollock and Wright on *Possession* (1888), p. 166; Beal on *Bailment* (1900), p. 40; and Halsbury's *Laws of England*, 2nd ed., Vol. 1, p. 775, sub tit. Bailment. In each of the authorities referred to the right of the bailor is limited to a case of gratuitous bailment, a requisite which, in my opinion, is fulfilled in the present case. The Bank held the bars, without any right of lien, at the will of the Commission.

"The Commission being, in my opinion, as I have indicated still in possession of fifty-one of the bars, it has to be determined whether they or the Bank are entitled to immunity from suit instituted by the respondents. Such an action, it is argued on behalf of the latter, can be brought and determined without in any way impleading the two Governments or affecting their rights. It is accepted by both parties that the principles to be considered are those laid down by Lord Atkin in *Compania Naviera Vascongado v. The Cristina* [1938] A.C. 485, 490. In the relevant passage he says, in regard to those principles: 'The first is that the Courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to proceedings or not, seize or detain property which is his or of which he is in possession or control.' As, in the view which I have expressed, the three Governments are in possession of the fifty-one bars, it is not necessary to inquire what is the exact meaning to be attributed to the word 'control'. It is enough that they are in possession and an attempt is being made to interfere with that possession.

"But it is said that the decision in *The Cristina* [1938] A.C. 485 is not of universal application but applies only to an action *in rem* and that, in other cases, retention in the hands of the possessor himself is required to bring its principles into force. It is true that the matter then under consideration was a ship and that a decision in respect of a ship is an action *in rem* and would therefore bind all the world and not the parties only, but the observations of those members of your Lordships' House who sat to decide the case were by no means confined to actions *in rem*. They extended to the case of all chattels: see, in particular, the observations of Lords Maugham and Wright. The principle, in my opinion, is a wider one and embraces any chattel, whether the subject of an action *in rem* or not. No doubt the doctrine should, as Lord Maugham said in *The Cristina* (*ibid.* 518) be narrowly watched, but it has always to be remembered that Governments must act through servants

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or agents and often through bailees, and it would destroy the efficacy of the doctrine if it were strictly confined to personal possession.

"I do not myself find any great enlightenment in the American cases on the subject under discussion. They all, I think, turn on who was in possession at a particular time and depend on their own facts.

"So far I have dealt with the claim of the respondents to recover the gold bars themselves and with their claim to an injunction. Sir Andrew Clark, however, on their behalf, expressed himself as willing to give up that claim and rest on his right to recover damages for conversion. Such a claim, he maintained, neither impleaded the sovereigns nor involved a seizure of their property. It was merely a claim for damages against the Bank. But if the Bank were ordered to pay damages to the respondents, Messrs. Dollfus Mieg et Cie.'s right of property would in law be transferred to them on their paying the damages awarded, and it would follow that, if the Tripartite Commission required the Bank to return the bars, the Bank could refuse to do so, relying on the title acquired by the payment of the damages, and thereby compel the Governments either to bring an action or forgo their rights. The object of the rule, it has been said, is that a sovereign may not be compelled either to submit to a foreign jurisdiction or be compelled to go to law to obtain or preserve his right. Such an object might be defeated if this action were permitted to proceed since the Bank is in possession and could refuse to surrender the bars and so compel the Governments, if so minded, to take action in an endeavour to recover them.

"One other point on the question of substance has been mentioned. It was suggested that immunity would only be granted where the country claiming it, in itself, granted reciprocal immunity to other nations. I can find no authority for this proposition, and in any case it was not taken either before Jenkins J. or in the Court of Appeal, and no material of fact has therefore been presented to your Lordships to enable them to deal with the argument or to ascertain whether the two Governments concerned grant reciprocal immunity or not. In my view, the argument in any case is not established. The question is, what is the law of nations by which civilized nations in general are bound, not how two individual nations may treat one another. See *per* Lord Maugham in *The Cristina* [1938] A.C. 485, 518.

"I would only add that, in my opinion, it might have been possible for the Court of Appeal to refuse to stay the action and allow it to proceed against the Bank, and in the course of that proceeding to ascertain the true relationship between the Bank

and the Tripartite Commission. If, as a result of those proceedings, it should have been held that the Commission was in possession or control of the gold bars, the claim to immunity would have succeeded and the action against the Bank would have failed. But, in fact, a different course was taken. The three Governments, whose interest it was contended took away the jurisdiction of the Courts to hear the case, applied to your Lordships' House either to be permitted to attend and argue the case before your Lordships or to be added as parties. On this application they were given leave to be added in order that they might enter a conditional appearance and claim immunity from the jurisdiction of the Courts of this country to deal with the matter. The two Governments concerned then applied to Romer J. to be added. They were given leave and were so added. Thereupon they filed further evidence and again applied that the action might be stayed. Both the learned Judge and the Court of Appeal refused to stay, and from that refusal the two Governments appeal to your Lordships' House. Had the action continued to be carried on against the Bank only, it might have been possible to ascertain all the facts more fully and accurately, and if it was found, after further steps had been taken, that the Bank had rightfully claimed immunity on the ground that the foreign Governments would be implicated or their rights invaded, the action could then have been stayed. As it is, the two Governments are parties, and it is therefore incumbent on your Lordships here and now to stay or refuse to stay the action. In these circumstances and on the material facts before your Lordships, I would agree with the noble Earl on the woolsack in staying the action as to the fifty-one bars but allowing it to proceed in respect of the thirteen."

Lord Radcliffe said:

"My Lords, I do not think that the difficulty in this case lies in deciding what relation the Bank of England bore to the Tripartite Commission in respect of the sixty-four gold bars that were delivered to the Bank. No doubt it was difficult to establish the facts upon which this relation depended, primarily because the Bank themselves seem to have known less than they might have about the real nature of their own proceedings. It was this uncertainty that led the Court of Appeal to take what I regard as a mistaken view of the facts. But when those facts are finally established and can be surveyed in their proper setting it seems to me reasonably clear that both at the date of the issue of the writ and at the dates of the launching of the relevant motions in this action the Bank were holding such of the bars as they then retained as mere depositors on behalf of the Commission. These bars were held for the time being in

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specie to the order of the Commission, subject to the stipulation that instructions placing them at the disposal of the Bank of France were not to be given unless accompanied by instructions from that Bank to ship at once from London. This deposit amounted to no more than a bailment at will.

“ I think that this view of the facts is one which in substance commends itself to all your Lordships, and I do not think it necessary to say anything more about it. It follows that I do not attach to the disposal of the thirteen bars of the original consignment which disappeared from the vault the same significance as was attached to it by all the members of the Court of Appeal. That incident can mean only one of two things. Either the fact that it happened at all is itself such cogent evidence that the bars were not held in specie that it ought to outweigh all other evidence that they were, or the removal of the bars was merely something which ought not to have been done and the doing of which was contrary to the arrangement which the Bank had come to. If the latter was all that the incident amounted to it is of no importance for our purpose. In my opinion the latter was all that the incident amounted to.

“ The important and difficult question is whether, on that basis of fact, anything ought to be done to arrest the plaintiffs' action. For the time being I will confine myself to the action so far as it relates to the fifty-one gold bars which are now all that the Bank retain. Does that action also offend against the rule of immunity of independent sovereigns which forms part of our municipal law? I treat the Commission as no more than three sovereigns joined in a particular relation. It is, of course, beyond question that there is some such rule and that it has been expounded or applied in a number of decisions in our Courts. But I do not feel confident that it can be, or that it ought to be, expressed in any very precise language: and I do not at all share the view, which rather dominated the argument of this appeal, that a definition of the rule has now become, as it were, graven on tables of stone and that those tables consist of the speech of Lord Atkin in *Compania Naviera Vascongado v. The Cristina* [1938] A.C. 485. For myself I think that the range and purpose of our rule is expressed as well as may be in Dicey's *Conflict of Laws*, 6th ed., p. 131: ‘ The Court has . . . no jurisdiction to entertain an action or proceeding against (1) any foreign sovereign. . . . Any action or proceeding against the property of [a foreign sovereign] is an action or proceeding against such person.’ This is the rule which Scrutton L.J. quoted with approval in *The Jupiter* [1924] P. 236, 243. The rule so expressed leaves open the question which is an action ‘ against the property of a foreign

sovereign' in any particular case. But I am afraid that the abundant argument that we had in this case as to the application of the words 'of which he is in possession or control', as used by Lord Atkin [1938] A.C. 485, 460, shows that even his summary leaves open as many questions as it settles. In fact this is not a field in which the law can be set at rest by any neat combination of words. But the rule as expressed in Dicey has this advantage: it does make clear that the property of a sovereign enjoys no immunity in legal proceedings except so far as those proceedings amount in one way or another to a suit against the sovereign.

"If the sovereign is actually named as a party to a suit the proceedings identify themselves. Even then I think that it is going too far to say that such a suit must necessarily be arrested. It may depend on the purpose for which the sovereign is made a party. But certainly a special difficulty begins when he is not actually named but the suit is one which may result in a judgment or order that will affect his interest in some piece of property. Even to say that much begs one important question, for it assumes that he has a valid interest in that property: whereas a stay of proceedings on the ground of immunity has normally to be granted or refused at a stage in the action when interests are claimed but not established, and indeed to require him to establish his interest before the Court (which may involve the Court's denial of his claim) is to do the very thing which the general principle requires that our Courts should not do. *The Parlement Belge*, 5 P.D. 197, is a leading case on this branch of the law, but it does not offer much help on the particular aspect of it with which your Lordships are now concerned because it was common ground throughout the case that the ship was the public property of the Kingdom of Belgium. What the plaintiffs objected to in that case was the staying of an action *in rem* about the ship having regard to the uses that she was put to by her sovereign owner. Once it was settled that those uses did not disqualify the owner from taking advantage of the general rule, it was easy to show that the Court's order for the arrest of the ship, if made, would be in substance an order against the sovereign.

"But the principle recognized in *The Parlement Belge*, 5 P.D. 197, has been carried much further since then. It has been applied even when the sovereign had not claimed, let alone proved, that he was the owner of the property that was the subject of the action. It has been regarded as sufficient to stay the proceedings (1) that he had *de facto* possession of the property (*The Gagara*, [1919] P. 95, *The Jupiter*, [1924] P. 236, *The Cristina*, [1938] A.C. 485) or such rights of direction and control, without possession, as arise from requisitioning

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(*The Broadmayne*, [1916] P. 64), and (2) that the nature of the proceedings is such that, if successful, they would result in an order of the Court affecting that possession or those other rights. *The Cristina*, [1938] A.C. 485, is, of course, a decision of this House: in it, the other decisions that I have referred to, all unanimous decisions of Courts of Appeal, were reviewed and, as I think, approved: in my opinion they constitute a principle wide enough in application to be conclusive of the present appeal.

"The special feature that we have to deal with is that the plaintiffs' action is not an action *in rem*, it does not come from the Court of Admiralty, it is an action for trover or detinue the basis of which is our common law of tort. Decisions of our Courts as to how to apply the principle of immunity to such a case are curiously lacking. Apart from the Admiralty cases, of which I have noticed a few, the other line of authority is to be traced in decisions of the Court of Chancery. These decisions depend essentially on the existence of a trust fund or other item of trust property within the area of jurisdiction of the Chancery Courts: given the trust fund or property, there is a trust to be administered by the Court and it was evidently the belief of the Judges who were responsible for the equity jurisdiction that they had a responsibility for administering and in due course determining the rights to such property, even though a foreign sovereign might be known to be a possible or certain claimant to an interest in it. I do not see any other explanation of Lord Hatherley's decision in *Larivière v. Morgan* (1872) L.R. 7 Ch. 550 that does not to some extent threaten the principle that has been well established in the Admiralty cases; and it is in effect the explanation of it that was given by Lord Cairns when the same case was before your Lordships' House (*Morgan v. Larivière* (1875) L.R. 7 H.L. 423, 430). Perhaps there is no real analogy between the actual possession or rights that existed in the Admiralty cases and the possible claim or interest envisaged by the Chancery cases. Perhaps it is enough to say that the Courts of Chancery treated trust property within their jurisdiction as a domestic responsibility to an extent that would not have commended itself to the Court of Admiralty when dealing with a ship that was found to be within the reach of its process.

"The Chancery decisions are well known and of long standing, and it is, I think, easier to treat them as a separate branch of our general law of sovereign immunity or as an exception from the main principle than to accept the cogency of Lord Langdale's explanation in *Duke of Brunswick v. King of Hanover* (1845) 6 Beav. 1, 39 that to make a foreign sovereign a party to administration proceedings does not 'compel' him to take

part in them, for it merely gives him 'an opportunity to come in to . . . establish his interest'. But I do not think that this line of authority is of any direct relevance in this appeal. Here there is no trust property and no trust. In my view the Admiralty decisions and the principles to be extracted from them have much more bearing upon the present case.

"Now what is the situation of fact here and what does this suit seek to get the Court to do? We know that the bars of gold entered this country from the possession of the Tripartite Commission and that the Bank hold them merely to the order and at the disposition of that Commission. In those circumstances I regard the gold as in the possession of the Commission for the purpose of the rule that we are considering. The property of a sovereign State, which is an abstraction, must be in the physical possession of some actual person, and I do not see any distinction of substance in a matter of this kind between the possession of a servant of the State and the possession of its bailee when the bailment is of such a nature as that of the Bank in this case. Indeed, I think that the Commission's 'possession and control' of the gold bars in the hands of the Bank amounted to a form of property more substantial than that which H.M. Government acquired by requisitioning the *Broadmayne* [1916] P. 64. Yet the *Broadmayne* was held to be exempt from arrest by virtue of His Majesty's immunity.

"The suit began as a claim in detinue. That means that the Court was going to be asked or at any rate could be asked to make an order upon the Bank to hand over the bars to the plaintiffs. Such an order would unquestionably interfere with the Commission's possession of them and compel the Commission, if they wished to recover possession, to come to Court and try to get them back from the plaintiffs. I cannot feel any doubt that such a suit offends against the principle of sovereign immunity. But then the plaintiffs through their counsel have said that they are willing, if necessary, to drop their claim in detinue and proceed with their action on the basis that it is a claim for conversion only, with the result that they will seek to obtain a judgment for damages against the Bank and no more. They say that no principle of immunity can be offended merely by mulcting the bailees in damages. How far this argument goes I am not clear. Every servant who insists on his master's title to property in his physical possession is liable to be sued for damages for conversion by the rightful owner, and there would be no such thing as the immunity of a foreign sovereign from suits 'against his movable property' in this country except suits *in rem* against ships. I have found much more difficulty than the learned Judges in the Courts

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below in dealing with this point. They felt it to be an obvious proposition that if the Court could not make a direct order upon the Bank to hand over the bars (and I agree that it could not) it was impossible that it could have any jurisdiction to award damages for a failure to do that very thing. I do not feel altogether satisfied that this is convincing logic: but when I consider the real nature of a claim for damages for conversion I come to the same conclusion. Subject to the payment of costs and special damages (if there are any) an action for damages for conversion can always be stayed if the defendant offers to hand over the property in dispute. In that sense a suit for damages for conversion is an attempt to use the Court's process to interfere with the existing possession of the chattel the title to which is in dispute. If the defendant continues to resist and damages are awarded against him he may keep the chattel and pay the damages; but if he does he becomes entitled, if he is a bailee, to set up the plaintiffs' title to the goods, which he has thus paid for, against his own bailor. In other words the Court's judgment in the personal action against him would materially affect the existing right of his bailor in respect of the possession and disposal of the chattel. The result of a judgment in damages has thus some analogy to a sale by the Court of a chattel which is in the possession or under the requisition of a foreign sovereign: if the sale cannot be ordered in the one case because to order it would be to use the Court's process against the sovereign, then the judgment cannot be rendered in the other. It is for that reason that I am of opinion that the action must be stayed so far as it seeks to impose liability upon the Bank in respect of the fifty-one gold bars which they still retain.

"This reasoning does not apply to the thirteen bars which have been disposed of. This is an accidental feature of the case which can only be attributed to the Bank's own error. But your Lordships must, I think, take the facts as you find them, and, so far as they are known to us, no reason appears why an action against the Bank for damages for conversion of these thirteen bars should be regarded as trenching on the sovereign immunity of the Governments which the Commission represent. I agree, therefore, that as to these thirteen bars, the action ought to be allowed to proceed."

Lord Tucker, after discussing the relationship between the Bank and the three Governments, continued:

"There has, I think, been a tendency in argument on this appeal to approach Lord Atkin's second proposition in *Compania Naviera Vascongado v. The Cristina* [1938] A.C. 485, 490, which was not necessary to the actual decision of that case, as if it was a statutory definition limiting the circumstances in

which the Courts of this country would refuse jurisdiction in cases where a foreign sovereign is not directly or indirectly impleaded. I think that Lord Atkin's language must be considered and interpreted in the light of previous authorities and of the speeches of the other members of your Lordships' House in *The Cristina* [1938] A.C. 485 and of Lord Atkin himself in *Government of the Republic of Spain v. The Arantzazu Mendi* [1939] A.C. 256, 265. The principle being based on the avoidance of the exercise of a jurisdiction which would offend the dignity or impinge on the independence of a foreign sovereign, I cannot think it would be right to place upon the word 'possession' as used by Lord Atkin any specially narrow or restricted meaning or to confine it to actual physical possession by the sovereign himself or his servants. The particular subject matter involved in this case could hardly have been placed anywhere else than in a Bank save possibly in the vaults of an embassy. Such considerations as this, viewed in the light of the principle underlying the doctrine of immunity, lead me to the conclusion that in this context the word 'possession' must include the right to immediate possession of chattels which have been in the actual physical possession of a foreign sovereign or his servants and are deposited for safe custody with a bailee in this country.

"The part of the case which has given me most difficulty, but as to which none of the Judges in the Courts below appear to have felt any doubt, is that which relates to the precise form of relief for which the plaintiffs are now asking, *viz.*, damages only for detainue or conversion based on the failure to return the bars on demand. The plaintiffs have now abandoned all claim to the return of the specific goods or for an injunction and are content to rely only on the claim for damages. It is said that this relief can be afforded to the plaintiffs without any way affecting the rights of the three Governments to possession of the gold bars, and that the doctrine of immunity was designed for the benefit of foreign sovereigns and not for the protection of persons resident within the jurisdiction who choose to enter into contractual relations with foreign Governments. Sharing as I do the disinclination expressed by Lord Maugham in *The Cristina* [1938] A.C. 485, 515-7 and by the Master of the Rolls in the present case [1950] Ch. 333, 347-8 to extend the doctrine of immunity beyond the limits already recognized, this is an argument which has seemed to me to require anxious consideration. I have, however, been persuaded to the view that—attractive as this submission is—to accede to it would really be an infringement of the principle of immunity. A defendant who satisfies a judgment in damages representing the value of goods detained or damages

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representing the value of goods detained or damages for their conversion acquires thereby such title to the goods as was vested in the plaintiff whose judgment has been satisfied. Such a judgment in the present case would accordingly require the Bank to do that which would materially alter the rights of the three Governments *vis-à-vis* the Bank to the gold bars and enable the Bank in its own right to do that which it otherwise could not have done, *i.e.*, to contest its bailor's title. The fact that any such action by the Bank in the present case might be highly improbable cannot affect the question of principle involved, and it seems to me that a judgment which would have this effect must be an infringement of the foreign sovereign's right to immediate possession of the bailed chattels and thus amount to a violation of the right to immunity.

"As to the thirteen gold bars which the Bank has sold wholly different considerations apply. It is conceded that the doctrine of immunity would not extend to afford any protection to the purchasers of the bars. The Bank, by its own act, has put an end to the bailment which alone afforded the protective umbrella of immunity. No case has therefore been made out for staying the plaintiffs' action in so far as it is confined to a claim for damages for conversion of the thirteen bars sold by the Bank since the issue of the writ—the Bank being content to treat such sale as if it had occurred before action brought and not requiring the plaintiffs to issue a fresh writ.

"For the reasons previously stated I would stay all further proceedings with regard to the remaining fifty-one bars.

"My Lords, save that I prefer to base myself on the three Governments' rights to immediate possession rather than on their control of the bars I find myself in complete agreement with the reasoning of the judgment of Jenkins J."

[Report; L.R. [1952] A.C. 582.]

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Jurisdiction—Exemption from—Foreign States—Waiver of Immunity—Implied Waiver—Institution of Proceedings—Immunity from Jurisdiction with Regard to Immovable Property—Extent of Principle of Immunity.

SULTAN OF JOHORE *v* ABUBAKAR.

Judicial Committee of the Privy Council

(Viscount Simon, Lord Porter, Lord Oaksey, Lord Radcliffe and Sir Alfred Bucknill.)

April 22, 1952.

THE FACTS (as stated by the Court).—This was an appeal from the decision of the Court of Appeal of the Colony of Singapore which arose in the following circumstances:

The appellant became Sultan of Johore, by succession to his father, in 1895. By an indenture dated December 1, 1903, he purported to convey to his wife, in consideration of the natural love and affection which he bore her, two plots of land belonging to him in Singapore with the dwelling-house erected thereon. On March 8, 1926, the lady died intestate, leaving surviving her the appellant and their only son, Abubakar Tunku (hereinafter called Abubakar), who is the first respondent. Abubakar was granted letters of administration of his mother's estate: on her intestacy he was entitled to three-quarters of the estate and the appellant to one-quarter. An indenture dated December 22, 1926, between the appellant and Abubakar purported to convey these two properties to the appellant to hold on trust for the eldest daughter of Abubakar during her life, and after her death for any of her issue then living. On March 1, 1939, this eldest daughter died intestate, an infant and unmarried, and Abubakar was on January 23, 1940, granted letters of administration of her estate. By Mohammedan law, on the girl's death intestate, her father, Abubakar, would become entitled to five-sixths of the properties and her mother, Ungku Fatimah, would be entitled to one-sixth. By an indenture dated June 28, 1944, between Abubakar, Ungu Fatimah and three individuals named as trustees, Abubakar and his wife assigned and transferred to the trustees certain properties and interests in properties in Singapore and Johore, including the two properties above mentioned.

In the course of the Second World War, the whole of Malaya (including Johore) and the Colony of Singapore were invaded, and for a time occupied, by Japanese military forces. Singapore itself was thus occupied on February 16, 1942, and this occupation continued until the Japanese were driven out in September 1945. On effecting their occupation the Japanese authorities expelled the British administration from Singapore: the Courts of that Colony were closed and the British Judges interned. There had previously been a Supreme Court of the Straits Settlements, embracing Singapore, Penang and Malacca, which sat in Singapore: this was distinct from the Supreme Court of the Federated Malay States. The Supreme Court of the Straits Settlements had jurisdiction to decide the title to immovable property in Singapore. In May 1942, the Japanese military administration set up, in place of the former Supreme Court of the Straits Settlement, a High Court called the "Syonan Kotohoin", staffed with judges appointed by the Japanese administration, which exercised a jurisdiction generally corresponding with that belonging to the former Supreme Court of the Straits Settlements. The practice and

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procedure of the Syonan Kotohoin was, in all respects material to this appeal, identical with the practice and procedure of the former Supreme Court of the Straits Settlements.

On May 3, 1945, the appellant took out an originating summons in the Court of the Judge at Syonan (Singapore), naming as defendant the Custodian of Enemy Property, Syonan. By this summons he applied to the Japanese Court to determine the construction of the deeds of December 1, 1903, and of December 22, 1926, above referred to, and to decide whether, having regard to the fact that the parties to these deeds were Mohammedans, the deeds were properly and lawfully executed under the law applicable to the parties and were valid. The summons was heard by one Pillai, a Japanese-appointed Judge of the Syonan Kotohoin. At the first hearing the defendant was represented, but on the adjournment for argument his representative was absent.

Judgment in the appellant's favour was given by Pillai on June 18, 1945, and it was declared that Mohammedan law was applicable to the gifts contained in the two deeds and that the two gifts were void and of no effect, so that the properties with which they dealt reverted to the appellant as sole beneficial owner thereof.

When the Japanese were driven out in September 1945, there followed a period during which authority was exercised by a British military administration, but on April 1, 1946, a new and separate Colony of Singapore was created by the Singapore Colony Order in Council, 1946 (S.R. & O., 1946, No. 464) made under the Straits Settlements (Repeal) Act, 1946. By section 14 of this Order in Council the Supreme Court of the Colony of Singapore was established, and it is this Court which has been functioning in the Colony of Singapore since that date.

Judicial proceedings which had been commenced before the Japanese occupation in the former Supreme Court of the Straits Settlements were linked with the newly created Supreme Court of the Colony of Singapore by section 44 of the Order in Council, which provided:

“ All proceedings (other than proceedings in the Prize Court) commenced before February 15, 1942, in any Court of Justice in or having jurisdiction in, the territory comprised in the Colony may be carried on in like manner as nearly as may be as if this Order and the Act of 1946 had not been made or passed, but in the corresponding Court of the Colony, and any such proceeding may be amended in such manner as may appear necessary or proper in order to bring it into conformity with the provisions of the Act of 1946 and of this Order.”

It was considered necessary, as a consequence of the ending

of the Japanese occupation and the establishment of the Supreme Court of the Colony of Singapore, to provide an opportunity (1) for carrying on before the appropriate Court of the Colony the proceedings which had been commenced but not concluded before a Japanese Court during the occupation, and (2) for reviewing decrees made by a Japanese Court in the appropriate Court of the Colony with a view to enabling an appeal to be brought against such decree or with a view to setting aside such decrees as ought not to stand. These objects were secured by the Japanese Judgments and Civil Proceedings Ordinance, 1946 (Singapore Ordinance No. 37 of 1946), the long title of which reads:—"An Ordinance to make provision with regard to judgments, orders and decrees of Japanese Courts and for the carrying on of proceedings instituted in such Courts during the period of Japanese occupation."

Section 4 of this Ordinance provided:

"(1) A party to any proceedings commenced before a Japanese Court which were pending at the cessation of the Japanese occupation, may apply to the appropriate Court, within three months from the commencement of this Ordinance or such extended time as the appropriate Court may allow, for leave to carry on such proceedings as proceedings of the appropriate Court.

"(2) Upon the hearing of the application the appropriate Court may order such proceedings to be carried on as though they had been instituted before the appropriate Court and may order such amendments and give such consequential or other directions in the matter as may seem just."

Section 3 of the Ordinance provided:

"(1) Any party to the proceedings in which a Japanese decree was made or given or any person aggrieved by such decree may, within three months from the commencement of this Ordinance, or within such extended time as the appropriate Court may allow, apply in the prescribed manner to the appropriate Court for an order—

- (a) that such decree be set aside either wholly or in part; or
- (b) that the applicant be at liberty to appeal against such decree."

Under this Ordinance Abubakar, the first respondent, together with the two other respondents as trustees, took out an originating summons in the High Court of the Colony of Singapore, claiming that they were persons aggrieved by the decree of June 18, 1945, of the Japanese Court in the appellant's favour, and applying to set aside this decree, or, alternatively, asking for liberty to appeal against the Japanese decree on grounds therein stated. On learning that the originating summons had been issued, the appellant's solicitors entered a conditional appearance on his behalf, which was followed up

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by a summons before the Judge in Chambers, in which the appellant applied that the originating summons might be set aside and all further proceedings under it stayed on the ground that the Court had no jurisdiction over the appellant, who claimed to be "a sovereign ruler". It was the decision on this summons which was now before their Lordships on appeal.

The appellant's application was heard in the High Court by Gordon Smith J. in March 1949, and by order dated April 7, 1949, the summons was dismissed with costs. The Judge held that at the material time the appellant was a sovereign ruler, but that he had waived his immunity by issuing the originating summons in the Syonan Kotohoin during the Japanese occupation. He held that the proceedings now sought to be stayed were not new proceedings, but were a continuation of the earlier proceedings in which the appellant had for the time being succeeded.

The appellant appealed from Gordon Smith J.'s decision to the Court of Appeal of the Colony of Singapore. His appeal was dismissed, but the reasons given by the three Judges differed materially and must be separately summarized. Murray-Aynsley C.J. held that the appellant's claim to be a sovereign ruler could not be established otherwise than by a statement made on behalf of His Majesty King George VI to that effect, and that the communications then before the Court from His Majesty's Secretary of State for the Colonies did not amount to such a statement. He further held that, if the sovereign status of the appellant had been duly established, there would have been no waiver by the appellant of his resulting immunity from the proceedings now taken against him by the respondents.

Sir H. C. Willan C.J., on the other hand, held that, in a case where certificates from the Colonial Office were not conclusive one way or the other, the Court was not precluded from looking to other evidence to determine whether the appellant was an independent sovereign. He considered that the right view to take on all the material before him was that the appellant was an independent sovereign. On the question of waiver, however, he held against the appellant. Waiver of a sovereign's immunity, in a case where the sovereign had himself instituted proceedings, continued, in his view, to operate if the application then made by the respondents to reverse the decree which the appellant had obtained was a continuance of the proceedings instituted by the appellant in the Japanese Court. He held that the provisions of the Ordinance of 1946 above set out had the effect of making the present application a continuation of such proceedings, and

therefore the claim by the appellant of immunity from the jurisdiction of the High Court of the Colony of Singapore failed.

The third Judge, Evans J., discussed the question whether other material could be considered on the question of sovereignty when there was no conclusive certificate from a Secretary of State before the Court. He held that the Syonan Kotohoin was not the same Court as that in which the respondents brought the present proceedings, and that the present proceedings were not the same as the proceedings started by the appellant. But his judgment was not based on his conclusion on these issues. The ground on which this Judge gave his decision against the appellant was that the appellant, notwithstanding his claim to be an independent sovereign and notwithstanding the view that he had not waived his immunity, was none the less subject to the jurisdiction of the Court inasmuch as the matter to be determined was "one concerning land, which is undoubtedly within the jurisdiction and which is the subject of a private and personal claim of the Sultan, and not a claim of public property of the State". Mr. MacKenna, for the respondents, cited various *dicta*, both English and foreign, in support of this view, and referred in this connection to the statement of Sir Robert Phillimore in *The Charkieh* (L.R. 4 Ad. & E. 59, 97)—a statement which was not in fact necessary for the decision—where that learned civilian stated that a sovereign's exemption from suit "is admitted not to apply to immovable property", and that this was one of "the universally acknowledged exceptions to the general rule of the sovereign's immunity". As will appear hereafter, their Lordships did not find it necessary to pronounce on this proposition in the present appeal.

Held: that the appeal must be dismissed. The Court said:

"There are . . . three main questions which have been raised in this litigation, the answers to which may be material in deciding it. First, is the appellant in this litigation to be regarded as a foreign sovereign? Secondly, if so, has he waived his immunity so as to disentitle him to a stay of proceedings on the respondents' originating summons? And thirdly, if both the above questions are answered in the appellant's favour, does this sovereign immunity extend to exclude the jurisdiction of the Court in a case where proceedings are connected with his claim to be entitled to immovable property situate within the jurisdiction of the Court?

"The first of these questions, which gave so much trouble to the Courts below, appears to their Lordships to be now definitely answered in the appellant's favour. Subsequent to

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the judgment and order of the Court of Appeal, correspondence passed between twelve Rulers of the Malay States and the then Colonial Secretary in which the former complained that the replies hitherto sent from the Colonial Office in answer to the request of the Courts in Singapore for information as to the status of the appellant were ambiguous, and that the Secretary of State, instead of issuing the required certificate, appeared to wish to leave the Courts to decide the matter in the light of the recent establishment of the Malay Federation. However, on February 1, 1951, the Secretary of State wrote a further letter to the Rulers of the Malay States in which it is categorically asserted that 'His Majesty's Government regard Your Highnesses as independent sovereigns in so far as your relations with His Majesty are concerned'.

"At the hearing before the Board this document was tendered to their Lordships, without objection from the respondents, as containing the necessary and conclusive information from the proper quarter. Their Lordships so accept it and take judicial notice of the fact so certified. They can therefore proceed on the admitted basis that the appellant was recognized by His Majesty's Government at the relevant time as an independent sovereign entitled to the immunities in respect of litigation which attach to that status.

"This renders it unnecessary to decide in this appeal a point on which some difference of opinion appears to be expressed in the speeches of the majority in *Duff Development Co., Ltd. v. Kelantan Government*, [1924] A.C. 797, namely, whether the status enjoyed by a foreign sovereign in a British Court can be established in case of doubt, only by certificate issued by the appropriate Secretary of State on behalf of the Crown, or whether a Court might be entitled, if the Crown failed to answer the inquiry in conclusive terms, to accept and act on 'secondary information' of another kind. (Contrast the speeches of Viscount Cave and Viscount Finlay with that of Lord Sumner.)

"The second question concerns waiver. The appellant himself started the proceedings before the Japanese Court, thereby invoking its jurisdiction on his behalf. As plaintiff, he obtained the decree declaring that he was the beneficial owner of the properties in question. If, therefore, the steps taken by the respondents with a view to reversing this decision are in the nature of an appeal from it to a Court having jurisdiction to reverse the decision which the appellant has obtained, he could not object to being made respondent in these appeal proceedings, for his original submission to the original Court binds him to accept the jurisdiction on appeal. If, on the other hand, the respondents' application to the High Court of the

Colony of Singapore to reverse the decree is a 'new' proceeding, and not a continuation of the previous one, the appellant's objection that he is a foreign sovereign would prevail, so far as the new proceeding impinged on his sovereign immunity. In *Duff Development Co. Ltd. v. Kelantan Government*, [1924] A.C. 797, after the Kelantan Government, which was recognized by the British Crown as a sovereign State, had agreed to arbitration and had itself applied to the British Court to set aside the award, it was held that, when proceedings were taken against it to enforce the award, this was a different proceeding in which it was entitled to set up its sovereign immunity, notwithstanding that it had waived this immunity in the previous proceedings. Viscount Cave put the contrast thus, *ibid.* 810: 'The application for leave to enforce the award is a new proceeding, and though connected with the earlier application is distinct from it.'

"Here, as Willan C.J. points out, the application of the respondents is concerned with the very matter raised by the appellant in the Japanese Court, namely, the title to these properties. Their Lordships are of opinion that section 3 of the Ordinance of 1946 on its true construction authorizes an application in the nature of an appeal from the Japanese decree. The Ordinance does not treat Japanese decrees as of no effect. Neither does it treat them as conclusive. It provides for their review, with the result that they might either be confirmed or modified or reversed. The procedure authorized is essentially a carrying on of the proceeding already instituted and not a new and distinct proceeding. The language of section 3 actually speaks of an appeal, and the purpose of the order is to provide a means of revising and, if necessary, correcting decrees made by the Japanese Court during the occupation. No doubt it is anomalous for a tribunal set up by one authority to operate as a court of appeal from the decisions of a tribunal set up by a different and previous authority, but this is what the Ordinance of 1946 does, and sub-section (4) of section 3 indicates good and necessary reasons for doing it. Otherwise, an erroneous decision given by the Japanese Court affecting private rights would stand without the possibility of correction. In the present instance the Japanese Court has decided, whether rightly or wrongly, that deeds previously executed by the appellant which purported to convey his private property in Singapore to others were invalid and that the properties still belong to him. In deciding this issue, the proper law to apply to the question of title is the same as it was before the Japanese occupation, inasmuch as military occupation, and even annexation does not in itself change the law in the area occupied; the only

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change is in the Court and in the judges who are to apply the law. The question, therefore, which is raised by the originating summons issued by the respondents and which is to be determined by the High Court of the Colony of Singapore is whether the decision of the Japanese Court was right or wrong, and to determine this the appellant is made respondent in what is in substance an appeal in proceedings which, by force of the Ordinance of 1946, are a continuance of the proceedings which the appellant himself instituted, and in any case are put in the same position as an appeal by section 3.

"The conclusion that the appellant must be treated as having submitted to the jurisdiction in the respondents' current proceedings makes it irrelevant to consider the third question which would otherwise have called for decision. That is, the question whether the principle that affords to a foreign independent sovereign immunity from process in our Courts is subject to any exception in the case of proceedings that concern the title to immovable property situate within the area of the Court's territorial jurisdiction. The point was, however, very fully argued during the course of the hearing and, moreover, in view of its public importance their Lordships invited and received the assistance of the Attorney-General to aid their consideration. While, therefore, they think that it would be wrong to express an opinion on an issue which does not, properly speaking, now arise, they are unwilling to conclude their advice to Her Majesty without making reference to one aspect of this controversy which was much canvassed before them.

"Their Lordships do not consider that there has been finally established in England (from whose rules the rules to be applied in the Court at Singapore would not differ) any absolute rule that a foreign independent sovereign cannot be impleaded in our Courts in any circumstances. It seems desirable to say this much having regard to inferences that might be drawn from some parts of the Court of Appeal's judgment in *The Parlement Belge*, 5 P.D. 197, and from the speech of Lord Atkin in *The Cristina*, [1938] A.C. 485. The word 'implead' is capable of more than one meaning when used in relation to judicial proceedings, which themselves comprehend a great variety of forms, and further distinctions have been suggested between what is direct and what is indirect impleading: but for the present purpose the definition of 'impleading' can be taken to be that which is laid down by Brett L.J. in the former case where he compares the position of a shipowner, whose vessel is seized in proceedings alleging liability arising from a collision, with the position of a subsequent innocent purchaser of the vessel. The Lord Justice

says 5 P.D. 197, 219: 'Either is affected in his interests by the judgment of a Court which is bound to give him the means of knowing that it is about to proceed to affect those interests and that it is bound to hear him if he objects. That is, in our opinion, an impleading.' Impleading, in this sense, does not depend merely on an answer to the more technical question whether a person is actually a party, or ought to be regarded as a necessary party, to the proceedings.

"There have certainly been cases in the Court of Chancery in which a foreign sovereign has been impleaded to the extent that the rights to a trust fund under the jurisdiction of the Court have been the subject of adjudication despite the fact that the sovereign has a possible interest in the fund. The best known case is *Larivière v. Morgan*, (1872) L.R. 7 Ch. 550; and, although the decision in that case was reversed on its facts when it reached the House of Lords, Lord Cairns seems to have felt no doubt as to the propriety of the jurisdiction exercised, L.R. 7 H.L. 423, 430. Indeed, in *Duke of Brunswick v. King of Hanover*, 6 Beav. 1, Lord Langdale evidently contemplated that in proceedings of such a kind the name of the foreign sovereign would be included among those of the defendants: *ibid.* 39.

"An action *in rem* against a ship impleads persons who are interested in the ship. That is settled law. There is even high authority for the view that such persons are, or may be, directly impleaded by such proceedings (*The Cristina* [1938] A.C. 485, 494, 505). If, however, it had been definitely determined that in no case could a foreign sovereign be impleaded without his consent, there could have been no justification for reserving the case of a sovereign's ship engaged in ordinary commerce—a reservation that was in fact made by the majority of the House of Lords in *The Cristina*. For a sovereign is impleaded by an action *in rem* against his ship, whether it is engaged in ordinary commerce or is employed for purposes that are more usually distinguished as public. The extent of the impleading is the same in the one case as in the other. Indeed, a great deal of the reasoning of the judgment in *The Parlement Belge*, 5 P.D. 197, would be inexplicable if there could be applied a universal rule without possible exception to the effect that, once the circumstance of a foreign sovereign being impleaded against his will can be established, a proceeding necessarily becomes defective by virtue of that circumstance alone.

"To say this is merely to disavow an alleged absolute and universal rule. It does nothing to throw doubt on the existence of the general principle. Nor is it necessary for their Lordships to express any opinion in this case on the question whether and, if so, to what extent, proceedings which concern the title

Case No. 38 to immovable property within the jurisdiction form an exception from this general rule. -
Contd. "Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. . . ."

[Report: [1952] A.C. 318.]

Case No. 39 **Jurisdiction—Immunity from—Foreign States—Counter-claim—Implied Waiver of Immunity—Interpleader—Recognition of Governments—Right of Unrecognized Government to Sue.**

REPUBLIC OF CHINA *v.* AMERICAN EXPRESS CO.

United States, Court of Appeals, Second Circuit.
February 4, 1952.

THE FACTS.—The Republic of China and its Directorate General of Postal Remittances, situated at Taipeh, Formosa, brought suit against the defendant to recover a deposit of \$524,990.16. The defendant, while not contesting the deposit, declined to pay on the ground that it was without sufficient knowledge to form a belief as to whom the deposit was due. It submitted evidence demonstrating that the Director General of Posts of the Government of the People's Republic of China, at Peking, an authority not recognized by the United States, had laid claim to the deposit, and counterclaimed to interplead the latter claimant. The defendant's counterclaim was granted below, and the defendant was discharged from liability upon payment into court of the said sum. The plaintiff sought reversal of the order below on the ground that the Court was without jurisdiction because: (1) of the sovereign immunity of the plaintiff; (2) of the contention that after the discharge of the defendant only aliens would be left as parties to the suit; and (3) of the asserted fact that the persons sought to be interpleaded were representatives of an unrecognized foreign Government who had no standing to sue and were, therefore, not adverse claimants as a matter of law.

Held: that the order below must be affirmed. The Court said:

"It is, and long has been, well settled that a friendly, foreign sovereign, recognized by the United States, cannot be sued in the Courts of this country without its consent. *The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 117, 3 L.Ed. 287; *Puente v. Spanish Nat. State*, 2 Cir., 116 F. 2d 43, *certiorari* denied, 314 U.S. 627, 62 S.Ct. 57, 86 L.Ed. 504. But this consent need not be expressly given and when a sovereign

sues in our Courts to enforce a claim 'it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.' *United States v. The Thekla*, 266 U.S. 328, 339, 340, 45 S.Ct. 112, 113, 69 L.Ed. 313. To like effect are *The Nuestra Senora de Regla*, 108 U.S. 92, 2 S.Ct. 287, 27 L.Ed. 662, and *The Paquete Habana*, 189 U.S. 453, 23 S.Ct. 593, 47 L.Ed. 900. Accordingly, we have held that a sovereign who sues in our Courts so submits itself to the jurisdiction it has invoked that defenses by way of set-off and of counterclaim are available against it. *United States v. National City Bank of New York*, 2 Cir., 83 F. 2d 236, *certiorari* denied, 299 U.S. 563, 57 S.Ct. 25, 81 L.Ed. 414; see *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 2 Cir., 43 F. 2d 705, 708, *certiorari* denied, 282 U.S. 896, 51 S.Ct. 181, 75 L.Ed. 789.¹ But the waiver of immunity does not extend beyond, at most, counterclaims which are based upon the subject matter of the suit. Immunity from claims based upon other causes of action was expressly left undisturbed by the decision in *The Thekla*, *supra*, as was pointed out in *United States v. Shaw*, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888.

"Thus, the subject matter of the suit which the sovereign has brought determines the extent to which immunity has thereby been waived. When the subject matter is the right to collect a deposit of money which the holder admits it owes and stands ready to pay to the party entitled to collect, and there are adverse claimants, *i.e.*, where, as here, there is a strict interpleader situation,² the sovereign's immunity will not prevent interpleading the adverse claimants. The underlying reasons are the same as in *The Thekla*, *supra*, and in *The Siren*, 7 Wall. 152, 19 L.Ed. 129. See *The Western Maid*, 257 U.S. 419, 434, 42 S.Ct. 159, 66 L.Ed. 299.

"There is, indeed, language in *Kingdom of Roumania v. Guaranty Trust Co. of New York*, 2 Cir., 250 F. 341 at p. 343, 345, *certiorari* denied 246 U.S. 663, 38 S.Ct. 333, 62 L.Ed. 928, which at first blush appears to be opposed to our holding in this case. That was a suit by a foreign sovereign to collect a bank deposit and the debtor bank obtained an order substituting one Arditti, who had an unrelated claim against the plaintiff, as the defendant and secured its own discharge upon the payment into court of the amount of the deposit the plaintiff had sued to recover. After stating that no 'reasonable basis is laid for an interpleader even between private persons'

¹ In *The Nuestra Senora de Regla*, *supra*, this submission to jurisdiction was even extended beyond strict defenses and a judgment for damages against the United States was directed. But see *United States v. Shaw*, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888.

² *Sherman Nat. Bank of New York v. Shubert Theatrical Co.*, 2 Cir., 247 F. 256, 259.

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the Court also pointed out that a suit by the sovereign against the bank to recover a deposit owed was not a waiver of its immunity from suit by other parties and added, 'If this be not so, the immunity can be frittered away either by interpleader or attachment in any case where a foreign sovereign undertakes to collect a debt owed it.' However, since that suit was one in which it had been recognized that the third party claimant could not be interpleaded by the bank, we think it reasonable to believe that so linking interpleader and attachment without distinction in connection with a waiver of immunity was either a direct reference to the particular kind of so-called interpleader there attempted or was inadvertent but, if not, we are unable to agree and hold that here interpleader was properly allowed.

"Nor was the original diversity jurisdiction of the Court under 28 U.S.C. § 1332 destroyed by the order allowing interpleader. *Rossetti v. Hill*, 9 Cir., 162 F. 2d 892; *Security Trust & Savings Bank of San Diego v. Walsh*, 9 Cir., 91 F. 2d 481; *Hunter v. Federal Life Ins. Co.*, 8 Cir., 111 F. 2d 551; *Mallers v. Equitable Life Assur. Soc. of the United States*, 7 Cir., 87 F. 2d 233, *certiorari* denied 301 U.S. 685, 57 S.Ct. 786, 81 L.Ed. 1343. See also *Harris v. Travelers Ins. Co.*, D.C.E.D.Pa., 40 F.Supp. 154.¹ The appellants' argument to the contrary is based upon the theory that the order, by discharging the appellee from liability, left no one but aliens as parties to the suit who will then be in litigation with each other in an action separate and distinct from the initial one. We cannot agree. The subsequent litigation will be ancillary to the original suit and the initial jurisdiction of that is sufficient. *Sherman National Bank of N. Y. v. Shubert Theatrical Co.*, 2 Cir., 247 F.256; *Marine Midland Trust Co. of N. Y. v. Irving Trust Co.*, D.C.S.D.N.Y., 56 F. 2d 385, appeal dismissed, *Marine Midland Trust Co. of New York v. Eybro Corporation*, 2 Cir., 58 F.2d 165.

"The final argument of the appellants, and the one urged most strongly, is that the alleged adverse claimants, being

¹ The Supreme Court, in *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, at p. 73, note 17, 60 S.Ct. 44, 84 L.Ed. 85, alluded to the above cited cases but, since the Court was there concerned with an interpretation of the Interpleader Act, it expressly refused to pass on the correctness of them. The implications of the Treinies decision is discussed in 3 Moore, Federal Practice (2d ed., 1948) at p. 3029 where it is said, "The Treinies case, based as it is upon the narrow view that the real controversy is between the claimants, does not answer the question as to federal jurisdiction under paragraph (1) [of Rule 22] where there is diversity between the stakeholder and the claimants but not diversity between the claimants". The writer then answers the question, at p. 3012 where he stated, "Jurisdiction of an action under paragraph (1) [of Rule 22] is well founded if there is diversity or alienage between the plaintiff on one side and claimants on the other, although there is no diversity between the claimants."

representatives of an unrecognized foreign Government, had no standing to sue and consequently, as a matter of law, could not be adverse claimants for the purpose of allowing interpleader. See *Koninklijke Lederfabriek 'Oisterwijk', N.V. v. Chase National Bank of the City of N. Y.*, 177 Misc. 186, 30 N.Y.S. 2d 518, affirmed 263 App. Div. 815, 32 N.Y.S. 2d 107 and *Amstelbank, N. V. v. Guaranty Trust Co. of N. Y.*, 177 Misc. 548, 31 N.Y.S. 2d 194. Granted that appellants' legal position is sound as to the disability of such parties to enforce claims in our Courts, whether these alleged adverse claimants are in fact representatives of an unrecognized foreign Government, and not private citizens or corporations, is itself an issue but one which cannot be decided upon the meagre record in that respect now before us. The record on this point merely contains assertions and counter assertions of the parties. The relevant facts should be found and given effect after adequate hearing on the remand. Cf. *Chase National Bank of the City of N. Y. v. Directorate General of Postal Remittances*, Sup., 112 N.Y.S. 2d 14. June 8, 1950, order modified, 278, App. Div. 824, 105 N.Y.S. 2d 416, order clarified, 278 App. Div. 935, 105 N.Y.S. 2d 923."

[Report: 195 F. 2d 230.]

NOTE.—This case is quoted in *University of Pennsylvania Law Review*, 101 (1952), p. 290. The decision below is at 95 F. Supp. 740 (1951). For a similar case see *Chase National Bank v. Directorate General of Postal Remittances & Savings Bank, etc., et al.* (1951), 278 A.D. 925, (1952), 303 N.Y. 801, (1951) 95 F. Supp. 733.

Jurisdiction—Immunity from—Foreign States—Counter-Claim—The Law of the United States of America. Case No. 40

REPUBLIC OF CHINA *v.* PANG-TSU MOW *ET AL.*

United States, District Court, District of Columbia.

April 19, 1952.

THE FACTS.—The plaintiff sued the defendants, officers of its Air Force, for an accounting and injunction, charging that they had misappropriated funds entrusted to them in their capacities as chiefs of the Chinese Air Force purchasing office in the United States. The defendants asserted two counter-claims, one for libel and the other for monies alleged to have been held by Mow for certain persons other than the plaintiff but improperly obtained by the plaintiff. The plaintiff sought dismissal of the counter-claims, pleading sovereign immunity.

Held: that the motion for the dismissal of the counter-claim for libel must be granted, and that for unlawful conversion denied. The Court said:

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“ A sovereign State entering the Courts of a friendly foreign nation subjects itself to counter-claim with respect to matters arising out of the same transaction as that upon which the original suit brought by it is based, to the extent that it affords recoupment against said sovereign State, but not beyond the point where affirmative relief is to be granted. In this view, I conclude that the counter-claim for libel should be dismissed, as I do not consider it to be a claim arising out of the same transaction as that upon which the suit brought by the Republic of China is based, although the alleged libel may have had reference or some relation to the claims asserted by the plaintiff.

“ As to the counter-claim for conversion, the pleadings are not sufficiently clear to enable the Court, in this posture of the case, to determine whether or not such counter-claim does arise out of the same transaction upon which the claims of the Republic of China are based. In argument and in affidavit there was statement made that the monies referred to in the counter-claim were part of the monies of the plaintiff, held by the defendants, which have been accounted for, and have been credited by the Republic of China to the defendants, and are not sought to be recovered in the instant case. As this is a motion to dismiss rather than a motion for summary judgment, I can look no further than the pleadings, and I am of the view that appropriate showing in the pleadings should be made with respect to the counter-claims, and, if any genuine issue of fact develops, such should be determined by the Court. The motion to dismiss said counter-claim for conversion is denied.”

[Report: 105 F. Supp. 411.]

NOTE.—Affirmed, in a consolidated appeal, by the United States Court of Appeals (1952), 201 F. 2d 195; a petition for writ of *certiorari* to the Supreme Court of the United States was denied (1953), 345 U.S. 925, 73 S.Ct. 784, 97 L.Ed. 1356. See also the related case of the same name (1951), 101 F. Supp. 646; *International Law Reports*, 1951, Case No. 26. The instant case is noted in *International and Comparative Law Quarterly*, 2 (1953); p. 480, and *Miami Law Quarterly*, 7 (1953), p. 263.

Jurisdiction—Immunity from—Foreign States—Instrumentality of—Criteria for Determining Whether a Corporation is an Instrumentality of its Government—Whether Supply of Oil to Naval Forces a Governmental Function—Immunity of Corporations which are Governmental Instrumentalities—Bases of the Doctrine of Sovereign Immunity—Immunity of Foreign Corporation under Government Control Engaging in Commercial Activities—Statement of the Foreign Government in Question—Judicial Notice of Sovereign Immunity—Whether Immunity of a Sovereign from Suit in a Foreign Court Need be Affirmatively Asserted. Case No. 41

In re INVESTIGATION OF WORLD ARRANGEMENTS WITH RELATION TO THE PRODUCTION, TRANSFORMATION, REFINING AND DISTRIBUTION OF PETROLEUM.

United States, District Court, District of Columbia.
December 15, 1952.

THE FACTS.—The United States Government commenced an investigation of alleged world-wide arrangements, by twenty-one oil companies, to determine whether there was a possible violation of the Sherman Anti-Trust Laws. Among the companies served with a subpoena *duces tecum* was the Anglo-Iranian Oil Company, Ltd., a British corporation controlled by the British Government. Having ruled that the privilege of sovereign immunity may be claimed only by the foreign sovereign and not by a private party for its own benefit, the Court, on the motion of Anglo-Iranian,

Held: that the subpoena directed to it should be quashed on the ground that the Company enjoyed sovereign immunity. The Court said:

“In the course of argument, specifically on November 7, 1952, counsel for the company read a letter in open court, dated October 9, 1952, addressed to the company’s directors and allegedly from Honorable Geoffrey Lloyd, Great Britain’s Minister of Fuel and Power. The letter was in the form of a directive and in pointed terms ordered the company officials ‘not to produce any documents which were not in the United States of America and which do not relate to business in the United States, without in either case, the authority of Her Majesty’s Government.’

“Initially, this Court voiced concern with the authenticity of the particular document, in that representations by foreign sovereigns are best accepted for local Court proceedings when presented either through the executive branch devoted to our international relationships, or by direct presentation to the Court from a duly qualified representative of the foreign power.

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Contd.**

The state of the document was further put in issue when the Special Assistant to the Attorney-General contended that the directive to the officers of the Anglo-Iranian Oil Company was not an act of the British Government.

"The diversity of views prompted this Court to write a letter dated November 26, 1952, to the Secretary of State asking:

' . . . that it be advised, in writing, and through the proper diplomatic channels, if these documents are properly authenticated, embrace a claim of sovereignty and have the official approval of Her Britannic Majesty's Government '.

On December 5, 1952, the Department of State, through an official of their legal branch, delivered to the Court a note from the Honorable Anthony Eden, which reads as follows:

' Foreign Office
S.W.1.

' I, the Right Honourable Anthony Eden, Member of Parliament, Her Majesty's Principal Secretary of State for Foreign Affairs hereby certify that the letter dated October 2 and addressed to the Anglo-Iranian Oil Company was signed by the Right Honourable Geoffrey Lloyd, Member of Parliament, in his capacity as Minister of Fuel and Power in Her Majesty's Government in the United Kingdom, and was issued with the official approval and under the full authority of Her Majesty's Government in the United Kingdom. This letter from the Minister of Fuel and Power embraced a claim of sovereignty in that it was addressed to British subjects and organisations by Her Majesty's Government in the exercise of their Governmental authority and in the British public interest, including the economic, strategic and political interests of Her Majesty's Government.

(signed) Anthony Eden

November 29, 1952.'

"Also filed in the cause and properly certified under Title 18, section 3494 and Title 28, section 1741 of the United States Code are foreign documents signifying Great Britain's interest and relationship with the Anglo-Iranian Oil Company.

"Courts take judicial notice of the sovereign character of a party and in case of doubt address their own inquiries to the executive. *Republic of China v. Pang-Tsu Mow*, D.C., 1951, 101 F.Supp. 646.¹ A foreign sovereign is immune from suit, without its consent, in courts of the United States. *The Exchange v. M'Faddon*, 7 Cranch. 116, 3 L.Ed. 287; *L'Invincible*, 1 Wheat. 238, 4 L.Ed. 80; *Ex parte Muir*, 254 U.S. 522, 41 S.Ct. 185, 65 L.Ed. 383; *Hannes v. Kingdom of Roumania Monopolies Institute*, 169 Misc. 544, 6 N.Y.S. 2d 960

¹ See *International Law Reports*, 1951, Case No.26.

and 260 App. Div. 189, 20 N.Y. 2d 825; *Republic of Mexico v. Hoffman*, 324 U.S. 30, 65 S.Ct. 530, 89 L.Ed. 729. The foreign Government may adopt the procedure of asking the State Department to allow immunity or they may also present their claim of immunity by appearance in the matter. *Republic of Mexico v. Hoffman*, *supra*. Both English and American Courts have held that a sovereign need not affirmatively assert this immunity. *Cardashian v. Snyder*, 57 Washington Law Reporter (1929) 738; *Mighell v. Sultan of Johore*, (1894) 1 G.B.149; *Nankivel v. Omsk All Russian Government*, 237 N.Y. 150, 142 N.E. 569; *Mason v. Inter-Colonial Ry. of Canada*, 197 Mass. 349, 83 N.E. 876, 16 L.R.A., N.S., 276; *Puente v. Spanish National State*, 2 Cir., 1940, 116 F.2d 43. Foreign governments have been held immune from suits even though they had never been recognized by the Government of the United States. *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372; 138 N.E. 24; *Nankivel v. Omsk All Russian Government*, *supra*. Where the political branch of the Government declines to assert an opinion as to the status of a foreign sovereign, involved in a legal proceeding, the Courts may decide for themselves whether all the requisites of immunity exist. *Republic of Mexico v. Hoffman*, *supra*.

"The first issue is whether the corporate entity involved in the Anglo-Iranian Oil Company is of such a character as to be recognized as a unit of the British Government. Under the circumstances at hand this would also require an observation to be made to the relationship existing between the corporate-agent and the Foreign Sovereign's governmental functions and duties.

"In determining whether or not a given corporation is an instrumentality of its Government it is not material whether the Government owns all the stock, *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577; none of the stock, *Farmers' & Mechanics' Sav. Bank of Minneapolis v. State of Minnesota*, 232 U.S. 516, 34 S.Ct. 354, 58 L.Ed. 706, or only a part of the stock, *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579; *Osborn v. Bank*, 9 Wheat. 738, 6 L.Ed. 204. The British Government, although having only slightly better than one-third of the capital investment of Anglo-Iranian, controls the corporation by reason of its ownership of the greater portion of the voting stock. However, of far more potency is the object and purpose of the corporation. Anglo-Iranian came into being as the result of an agreement between Anglo-Persian Oil Company, Ltd., and the British Government in the year 1914. The latter acquired its interest in this company to insure a proper supply of petroleum, crude oil and other products for the British Fleet. In the

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agreement drawn up with the Anglo-Persian Oil Company there appears the following clause:

‘ Paragraph 13. A large consumer like the Admiralty, with the national interest of naval defense in its keeping, cannot, however place itself in a position of dependence for vital supplies upon a few large companies whose interests are necessarily cosmopolitan and financial, . . . It is important and essential in naval interests to secure that at least one large British Oil Company shall be maintained, having independent control of considerable supplies of natural petroleum, and bound to the Government by financial and contractual obligations . . . ’

“ Britain’s Navy, in past wars, has proved itself to be one of the island-kingdom’s main bulwarks of defense against aggression. The supplying of oil to insure the maintenance and operation of a naval force—and in this day and age, an air force—is certainly a fundamental government function serving a public purpose. See *Berizzi Bros. v. The Pesaro*, 1926, 271 U.S. 562, 46 S.Ct. 611, 70 L.Ed. 1088.

“ This Court notes that one of Great Britain’s contentions before the International Court of Justice in 1951, with regard to the Iranian Oil disputes, was that the agreement of 1933 between the Iran and the Anglo-Iranian Oil Company was in effect a treaty or convention between *two sovereign States* and therefore the International Court of Justice did have jurisdiction over the controversy. (Underlining supplied.)

“ This Court is of the impression that the corporation, Anglo-Iranian Oil Company, is indistinguishable from the Government of Great Britain. *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, 2 Cir., 1930, 43 F. 2d 705 (Since the corporation and the Government of Sweden are one and the same, immunity should be granted); *Bradford v. Dir. Gen. of Railways of Mexico*, Tex.Civ.App., 1925, 278 S.W. 251. (Since the railroad is operated by agency of government, suit is against the State itself); *Mason v. Inter-colonial Ry. of Canada*, 1908, 197 Mass. 349, 83 N.E. 876, 16 L.R.A., N.S., 276 (Suit is virtually against the sovereign of a foreign country); and *United States of Mexico v. Schmuck*, 1944, 293 N.Y. 264, 56 N.E. 2d 577, 56 N.E. (2) 577 (the Court allowed a Mexican corporation, operating an expropriated oil field, to exercise the right of a friendly sovereign and held it was ‘ immune ’ from suit in the United States).

“ To cite a foreign sovereign into an American Court for any complaint against him in his public capacity is contrary to the law of nations. *De Haber v. Queen of Portugal*, 17 Q.B. 171. All the reasons for immunity which are the basis of the doctrine in international law as incorporated into our law

exist herein. There is the same necessity for reciprocal rights of immunity, the same feelings of injured pride if jurisdiction is sought to be exercised, the same risk of belligerent action if Government property is subsequently seized or injured. *Government of the Republic of Spain and S.S. Arantzazu Mendi*, (1939) App. Cases (England) 256, 265.

“The consequences of a successful prosecution of Anglo-Iranian here would in reality be to charge and find the British Government guilty of violating a law of the United States, which imposes criminal penalties.

“This Court has compared *United States v. Deutsches Kalisyndikat Gesellschaft*, D.C., 31 F. 2d 199 where it was held a suit by the United States Government to enjoin violations of antitrust laws was maintainable against a corporation organized under general corporation law of France and in which France owned eleven-fifteenths of the capital stock. However, the French Government was involved in a commercial venture, entirely divorced from any governmental function. There is a vast distinction between a seafaring island-nation maintaining a constant supply of maritime fuel and a Government seeking additional revenue in the American markets and causing a direct injury in the United States to our domestic commercial structure.

“The English Government has expressed its position in this matter in a note signed by the Honorable Anthony Eden, Her Majesty’s principal Secretary of State for Foreign Affairs, and in a letter signed by the Honorable Geoffrey Lloyd, Minister of Fuel and Power, which passed through the State Department without comment or instructions; the purport of both writings is a clear and positive indication that Great Britain is seeking full protection of her interests; embraces a claim of sovereignty and asserts her privilege of immunity. The significance is unmistakable. In argument both sides have agreed that the interpretation of the correspondence is a judicial function and does not depend for finality upon advice or interpretation from the executive. Accordingly, sovereign immunity is extended to Anglo-Iranian and the subpoena served upon this company is quashed.”

[Report: 13 F.R.D. 280.]

NOTE.—For a stipulation by the parties and a holding by the Courts that a tanker owned by the United States Government and allocated to the United States Navy for the carriage of oil was a public vessel, see *Neri v. United States* (1952), 102 F. Supp. 718, (1953), 204 F. 2d 867. See also *Lopez v. United States* (1952), 102 F. Supp. 870.

Case **Jurisdiction—Exemption from—Foreign Public Corporation**
No. 42 **Exercising Public Functions—Recognition—Of Governments**
 —Nature of.

MARTIN *v.* BANK OF SPAIN.

France, Cour de Cassation. November 3, 1952.

THE FACTS.—The appellants claimed to have acquired in France, in the summer of 1936, 180,000 pesetas in Spanish bank-notes; these, however, were not accompanied by the export permits then required by decrees of the Spanish Republican Government. In November 1936, the Nationalist Government of General Franco required all notes to be stamped and exchanged for new notes which were now legal tender in Spain. The applicants presented their notes, without export permits, to the Customs Office at La Linea de la Concepcion, which first refused to accept them, and then accepted them for deposit and issued a receipt. The appellants never received any new notes in exchange. They accordingly sued the Bank of Spain for the recovery of the sum in question in valid notes. The Bank of Spain entered a plea to the jurisdiction. The Court of first instance and the Court of Appeal accepted the plea, on the ground that the stamping of notes which were no longer valid, and their exchange for notes which were legal tender, was an exercise of the sovereignty of the Spanish State, and that the Bank was entitled to immunity from jurisdiction in respect thereto. This was a further appeal from that decision.

Held: that the appeal must be dismissed. When the Bank exercised public authority its acts were not subject to judicial control in France. The Court said:

“The Bank of Spain enjoys legal personality for the purpose of engaging in commerce; when it so acts it is subject to the jurisdiction of courts in the same way as other traders. The position is entirely different when it is required to stamp bank-notes, or exchange them, on conditions strictly laid down by the Spanish State, and on behalf of the latter. In the circumstances of this present case the Bank was merely an agent of the Spanish State exercising its public authority. Accordingly, the acts in question, even apart from the principle of immunity from jurisdiction, were public acts which are not subject to judicial control in France.

“The appellant contends that at the time when the notes were handed in at the Customs Office, the Nationalist Government had not yet been recognized by France. However, it is not contested that recognition, which is not constitutive but declaratory, had been granted at the time of the institution

of the action. The Court of Appeal was thus correct in considering that that Government represented a foreign sovereign State."

[Report: *Revue Critique de Droit international privé*, XLII (1953), p. 425.]

Jurisdiction—Immunity from—Foreign States—Distinction between Public Law and Private Law Activities—The Law of Italy.

**Case
No. 43**

CASTIGLIONI *v.* FEDERAL PEOPLE'S REPUBLIC OF YUGOSLAVIA.

Italy, Tribunal of Rome. January 28, 1952.

THE FACTS.—These were proceedings in the nature of an action for money had and received arising out of a transaction of a private law character, brought by an Italian national against the Republic of Yugoslavia. Process was issued against the Republic of Yugoslavia at Belgrade in the person of the President for the time being of the Federal Government, as represented in Italy by the then Yugoslav Minister Plenipotentiary accredited to the Italian Republic. Service was effected, pursuant to the directions of the Court, both upon the President *via* the Division of Protocol of the Italian Ministry of Foreign Affairs and, in conformity with the rules laid down in Article 151 of the Italian Code of Civil Procedure respecting service upon defendants neither resident nor present within the State, upon the Yugoslav Minister in Rome. The defendant not appearing, the Court enquired into its jurisdiction of its own motion.

Held: that the proceedings had been regularly instituted and that the Court had jurisdiction in the matter. Service had been effected upon the Head of the Yugoslav State. The service upon the Yugoslav Minister was, moreover, regular. A diplomatic agent is not protected by his immunities from being made a defendant in proceedings against the State which he represents where such proceedings lie. And in Italian law, agreeably to the principles of international law, although a foreign State is immune from curial jurisdiction in so far as concerns its acts of a public law character, it is not so immune in a matter arising out of a transaction of a private law character. The Court said:

"The defendant Federal People's Republic of Yugoslavia not having appeared, the Court must of its own motion examine the jurisdictional question. . . . It is unquestionable that the Yugoslav Republic was properly made a party to the proceedings *via* the President of the Government for the time being. In virtue of Article 7 of the Constitution of February 1, 1951,

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' the supreme executive and administrative organ of the [Republic of Yugoslavia] is the Federal Government ' and, in virtue of Article 82, ' The President of the Federal Government represents the Government '. Hence the President of the Federal Government is, in terms of the applicable law, that of Yugoslavia, the chief representative of the Yugoslav State in matters of both substance and procedure.

" It is, on the other hand, in general terms a more open question whether the diplomatic agent of a foreign State may properly be treated as representing the latter in the contexts of private law and procedure. In the instant case this question does not really arise because, as has been seen, process was served not only on the Yugoslav diplomatic representative in Rome but also directly upon the chief representative of the Yugoslav State, that is to say, the President of the Federal Government. But it is perhaps desirable nevertheless to deal with it shortly.

" It has always been accepted that a diplomatic agent ' represents ' his State *vis-à-vis* the Government of the State to which he is accredited, that he has charge of the public and private interests of his State, and that he may protect the rights of nationals of the latter State. But writers have not considered to any great extent the capacity of such an agent to represent his State, or the Government thereof, in transactions of a private law character, or to represent the latter in proceedings in which it becomes involved as a result of such transactions. In the view of the Court, however, to hold that a diplomatic agent has this capacity would imply nothing incompatible with the nature of the diplomatic office. Indeed, as has been seen, the functions of diplomatic agents are of wide scope and are not circumscribed by any rule of international law. Such an agent is the official representative of one State within the territory of another. There is nothing improper in, nor is there any rule of international law to forbid, the extension of the functions of such an agent beyond the sphere of political or public activity—especially at the present day, when private law activities of States are extensive and diverse and when the majority of writers reject the former theory, based on the distinction between acts *jure imperii* and acts *jure gestionis*, that the personality of the State in public law is distinct from its personality in private law and view it instead as a single entity endowed with a personality operative in both spheres.

" This view of things does not, moreover, involve any conflict with the rules governing the immunities of diplomatic agents, nor with the essentials of diplomatic privileges. For it is clear that the receiving State concedes the customary

immunities and privileges, which of course include immunity from jurisdiction in general and from civil jurisdiction in particular, motives of international courtesy apart, in order to ensure respect for the status of a foreign envoy within its territory and to facilitate the due discharge of his functions. It is for this reason that writers maintain that these immunities attach to the envoy personally and not merely to him *qua* an organ of the sending State, and that they are available in proceedings in which he is personally involved rather than in those arising out of the exercise of his official functions. Diplomatic immunity from civil jurisdiction, if it is to conform to its object and nature, must be limited, in the view of this school of writers, to proceedings in which the envoy concerned is joined as defendant in his personal capacity. Where the action arises out of his activities *qua* an organ of the sending State it has nothing to do with his personal capacity, to which the immunity attaches, but is directed against the foreign State concerned. And in an action of this sort the question is no longer one of diplomatic immunities but the quite different one of the extent to which one State may assume civil jurisdiction over another, and in consequence over an organ of that other, namely, a diplomatic envoy.

“Applying this indisputable principle here, it must be concluded that if the rules as to diplomatic immunities do not debar a diplomatic agent from acting as an organ of his State even in a matter of a private law character, they do not, either, prevent his being joined as a defendant in proceedings arising out of a matter of a private law character in which that State is involved. Such an agent may be so joined if the receiving State is entitled to take jurisdiction over a foreign State and its organs in the matter in issue. The question whether the receiving State is so entitled, however, has nothing to do with procedural capacity or effective joinder of parties, but raises a wholly different question as to jurisdiction.

“The Court’s view of the matter is borne out by custom which is, of course, the largest source of international legal rules. As the plaintiff has averred, diplomatic agents have very often entered into relations of a private law character, principally contracts, as agents for the States which accredit them. They have appeared in suits without any special authorization and have indeed often, in their capacity as organs of the States to which they belong, themselves authorized other persons to act for them in such matters. The Yugoslav Minister has only recently done an act of this character, as appears from the testimony of the Land Registrar. Correspondingly, proceedings have been brought on the basis of relations of a private law character against foreign States *via*

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No. 43
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the diplomatic representatives of the latter without any question of procedural capacity or effective joinder of parties being raised, as distinct from a question as to the existence of any jurisdiction at all over the foreign State concerned. . . .¹

"Granting then that the action has been duly instituted as between Castiglioni as plaintiff and the Yugoslav Republic as defendant (whence it appears that the examining magistrate correctly ruled the latter to be in technical contempt through non-appearance), the Court must proceed further of its own motion, pursuant to Article 37 (c) of the Code, to determine the existence or non-existence of its competence to entertain the plaintiff's claim. This question may first of all be looked at generally. May one State assume jurisdiction over another in a matter of a private law character?

"The question of the immunity of one State from the jurisdiction of another has been and continues to be a very vexed one in both theory and practice. Attitudes and ideas concerning it are at the moment in process of change and evolution. Formerly, under the influence of the doctrine of the independence and equality of States—*par in parem non habet imperium*—international practice did not admit that one State was subject to the jurisdiction of another in any respect, and followed a rule of absolute immunity. This rule was contributed to by the circumstance that the State was regarded as being incapable of being sued in its own Courts even in relation to a matter of a private law character. But the theoretical basis of the rule was weakened when it came to be seen that the State could easily be subjected in its own territory to the normal procedural rules and made as much a subject of its own law as any individual living within that territory. When this development occurred nothing but the doctrine of equality stood in the way of recognizing that a State might be bound by a foreign system of municipal law as a result of entering into transactions in its private law capacity. Hence an opposite principle has come to be admitted in international theory and practice, as well as in the jurisprudence of many countries.

"Thus in Italian jurisprudence it is held, consistently with the opinions of the more authoritative writers, that although a foreign State is wholly immune from the jurisdiction in respect of its activities in the sphere of public law, there is no reason why this should be the case in connection with relationships in which that State is subject to a system of

¹ The Court here referred to its own decision of April 24, 1947, and to that of the Court of Cassation of September 21, 1948: *Government of Bolivia v. Italian Association for Aeronautical Exports* (Annual Digest, 1948, Case No. 41).

private law. This principle was laid down already in the decision of the Court of Cassation of March 12, 1926¹ (*Foro Italiano*, 1926, I, 584), and confirmed in the decisions of the same Court of January 18, 1933 (*ibid.*, 1933, I, 1520)² and May 12, 1947 (*ibid.*, *Repertorio*, s.v. *Compet. civ.*, Nos. 143 and 144),³ wherein the Italian State was held to have full jurisdiction over the Russian State with respect to a purely commercial transaction entered into in Italian territory, but held not to have jurisdiction with respect to a contract of employment entered into between the Russian diplomatic mission, an organ of the Russian State, and a subordinate. And the same principle was affirmed in the exhaustive judgment of the same Court of September 21, 1948, whereby Italian jurisdiction was asserted over the State of Bolivia in relation to a contract of a private law character entered into in Italy with an Italian national.⁴

"The Court could content itself with the mere recital of this unbroken line of decisions but for the circumstance that it is desirable to go into the matter fully and but for the fact that the latest judgment of the Court of Cassation, notwithstanding that the conclusion it reaches is accepted by the majority of our writers, has given rise to an interesting and lively debate concerning the principles on which it is based. It requires also to be taken into consideration that, as appears from a communication made to the Court by the Ministry of Foreign Affairs, the Yugoslav diplomatic mission in Rome has contended in connection with these proceedings that any assumption of jurisdiction therein by an Italian Court would constitute a departure from 'the unanimous practice of all civilized peoples, a practice which in itself constitutes one of the foundations of international law', and has requested that Ministry to 'bring to the attention of the Tribunal of Rome the Yugoslav attitude in the matter'—an attitude which would exclude the assumption of jurisdiction.

"The first step in an enquiry into the matter is to determine whether or not there is any rule of international law which requires that jurisdiction shall be disclaimed. It is obvious that there is no written rule nor any convention or treaty dealing specifically with the point at issue. It is more arguable whether or not there exists any rule of customary international law which is applicable. It is indeed clear that, if such a

¹ *Roumanian State v. Gabriele Tratti* (*Annual Digest*, 1925-1926, Case No. 128).

² *Russian Trade Delegation in Italy v. Kazmann* (*Annual Digest*, 1933-1934, Case No. 69).

³ *Government of Bolivia v. Italian Association for Aeronautical Exports* (*Annual Digest*, 1948, Case No. 41).

⁴ *Ibid.*

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customary rule existed, it ought to be applied by the Italian State and by the judicial authorities of the latter pursuant to the principle of the automatic incorporation of international law in municipal law—a principle the force of which was long debated during the currency of the former Constitution, wherein no mention of it was made, but which according to one school of thought was tacitly accepted and which has been expressly enshrined in the new Constitution, Article 10 whereof provides that ‘ Italian law incorporates generally recognized rules of international law ’. This Article declares the will of the State that recognized rules of international law shall apply directly *qua* rules of municipal law.

“ But there must exist a veritable international customary rule and not merely a practice of a single State, or of certain States, confined in its operation to the municipal systems of the States concerned, before it is possible to speak of a ‘ generally recognized ’ rule which is automatically incorporated as part of Italian law. What is requisite is a rule consistently observed by the majority of States in their mutual relations as a rule of the international legal system—a rule which, according to the more modern and more authoritative theory as to the nature of international custom, must be deducible from repeated and uniform instances of the practice of the whole or the greater part of the family of nations.

“ There does not in fact exist any such consistent rule debarring one State from subjecting another to its civil jurisdiction with respect to transactions of a private law character entered into within its territory by that other. As has been seen, authoritative writers, principally Italians, have disapproved the doctrine of the complete immunity of States from national civil jurisdiction as a relic of the absolutist conception of the State, and case-law as well as doctrine is increasingly favourable to the concession rather than the denial of jurisdiction to one State over another. Such is the position in Italian law as a result of the decisions of the Court of Cassation to which reference has been made. And it is to be noted that the law of Belgium, the first to abandon the old principle of complete immunity, conforms to that of Italy in this regard, and that the law of Switzerland, Roumania and Egypt, and recently also that of France, show a similar tendency. Even in the Anglo-Saxon countries, where, as a result of the traditional respect for ancient custom to which the maxim *stare decisis* bears witness, the old, absolutist principle was most firmly rooted, exceptions to it and doubts concerning its practical utility have recently been admitted.

“ This suffices to establish the complete non-existence of any such constant and uniform practice of the majority of

States as may give rise to a 'generally recognized' rule requiring complete exemption from jurisdiction and shows indeed that, instead of such a rule, an exactly contrary practice is gradually developing. This being established, it is necessary next to enquire whether there is any rule of Italian municipal law directly or indirectly touching the matter of exemption of foreign States from civil jurisdiction. No such rule is in fact to be found. The provisions of the Code of Civil Procedure as to jurisdiction over aliens (Article 4) refer merely to 'aliens' generally, comparably to Articles 105-107 of the Code of 1865. Decree-Law No. 1621 of August 30, 1925, rendered statutory by Law No. 1263 of July 15, 1926, indeed provides that 'no sequestration or other measure of execution shall be levied upon the movable or immovable property, vessels, balances, credits or other assets of any foreign State without the consent of the Minister of Justice'. But that provision clearly refers to execution and not to jurisdiction, with which the decree has nothing to do. However, the admission of the possibility of levying execution upon a foreign State involves the acknowledgment of the propriety of proceedings upon which such execution might be based.

"Failing any rule of international law exempting States from foreign municipal jurisdiction—and it may be observed incidentally that there may not be invoked in this connection the rules as to diplomatic immunity, which apply in a quite different context and are of an exceptional character—and failing, equally, any municipal rule, it becomes clear that recourse must be had to different criteria. In the view of the Court the proper course to take in order to reach a decision is not so much to endeavour to apply fundamental principles of municipal law by way of analogy as to go back to the fundamental principles and rules which are acknowledged in international law to be the foundations of the family of nations: that is to say, firstly, to the principle which is the basis of the celebrated and universally accepted maxim *par in parem non habet imperium* and, in the second place, to the even more fundamental principle that States should fulfil their obligations and discharge the functions which fall to them as subjects of international law in good faith. This principle of *bona fides* is endorsed both by writers and by the decisions of international courts (see the decision of the Permanent Court of Arbitration of February 22, 1904, in an arbitration between Italy, Germany and the United Kingdom, on the one hand, and Venezuela, on the other, respecting the treatment of aliens), and is expressly recognized in important treaties (see Article 13 of the Covenant of the League of Nations and Article 2 (2) of the Charter of the United Nations).

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" It is wholly consistent with the principle of good faith between nations and with the doctrine of the equality and independence of States to maintain that every State member of the family of nations may, now that the mediaeval doctrine of the immunity of the State has been discarded, treat other States as having the same status in its own law as it has itself. Thus, if in a particular instance a State is amenable to the jurisdiction of its own Courts in regard to its transactions with private individuals, it may, without violating any rule or principle of international law, subject a foreign State which conducts itself in the same manner as any foreign national may conduct himself to a similar measure of jurisdiction.

" On this basis, and not on that of any interpretation by way of somewhat far-fetched analogy between rules belonging to diverse legal orders, in order to decide whether a foreign State is subject to or exempt from the jurisdiction of the Italian Courts it is necessary to enquire whether the Italian State would have been amenable to that jurisdiction on the facts of this case. And the now firm principle that, though the personality of the State is one and indivisible, there is a distinction between its capacity in public law and its capacity in private law, of course provides the answer here. For that principle involves that the State is not amenable to the jurisdiction of the ordinary Courts when it is acting within its sovereign sphere as an entity invested with *potestas imperii* for the accomplishment of its social function, but that it is so subject in the same manner as a private individual when it enters into a relationship of a private law character for the achievement of some purpose having that character.

" It follows that, as was laid down in the decision of the Court of Cassation of 1948 to which reference has been made, the principles of international law deny to the Italian State any jurisdiction over a foreign State when the latter is acting in the sphere of public law in right of its sovereign power, but permit of its being treated on the same footing as a foreign individual in so far as concerns its active and passive *persona standi in judicio* when such foreign State is acting within the sphere of private law. . . ."

[Report: *Foro Italiano*, 1952, I, 796.]

Jurisdiction—Exemptions from—Immunity of Foreign States from Execution—Judgment against Employee of Occupying Power — Whether Municipal Court Entitled to Serve Garnishee Order on Occupying Power. Case No. 44

GARNISHEE PROCEEDINGS AGAINST OCCUPANT (AUSTRIA) CASE.

Austria, District Court of Appeal of Vienna.

November 6, 1952.

THE FACTS.—The appellant-creditor had obtained judgment for payment of a sum of money against a debtor who was employed by the United States Air Force in Austria. The creditor's application for service of a garnishee order on the United States Air Force, in order that the latter might pay to him, the creditor, such salary as might become due to the debtor, was refused by the Court of first instance on the ground that the United States Air Force was immune from the jurisdiction of the Austrian Courts.

Held: that the refusal of the Court of first instance to grant the creditor's application for service of a garnishee order on the United States Air Force must be upheld. The Court said:

"The execution creditor contends that the intended execution of the judgment is not directed against the United States as Occupying Power, but against a judgment debtor in Austria, and that there is therefore no justification for the refusal to permit the execution for which application has been made. As this Court has previously pointed out in its judgments, and in agreement with the majority of judgments of other Courts, a foreign State is not subject to the jurisdiction of the Austrian Courts in proceedings for execution, not even where the execution is not directed immediately against it. A garnishee order in respect of a claim for the payment of money consists in the issue of an order against the garnishee prohibiting payment by the latter. Case-law is to the effect that such an order cannot be made against foreign garnishees because it would constitute an infringement of the jurisdictional sovereignty of the foreign State concerned. The reference of the notice of appeal to No. 28 of the Repertory of Precedents of the Supreme Court¹ is misconceived because that *dictum* only affirmed the competence of the Austrian Courts to adjudicate upon contentious cases in which the foreign State concerned has not acted in the execution of its sovereign power. The rules enunciated in this *dictum* are not applicable to

¹ Reference is here made to *Dralle v. Republic of Czechoslovakia* (International Law Reports, 1950, Case No. 41, at p. 166).

proceedings for the execution of judgments. The Court of first instance was therefore right in rejecting the application, and the appeal must be dismissed."

[Report: ÖJZ, 8 (1953), p. 21.]

(b) HEADS OF FOREIGN STATES

Case No. 45 **Jurisdiction—Exemptions from—Ruler of State Member of Pakistan Federation—Sovereignty Limited by Instruments of Accession to Federation—Whether Entitled to Immunity from Jurisdiction of English Courts—Certificate of Commonwealth Relations Office—Whether Certificate Conclusive—Indian Independence Act, 1947—Pakistan Citizenship Act, 1951.**

SAYCE *v.* AMEER RULER SADIG MOHAMMAD ABBASI
BAHAWALPUR STATE.

England, Court of Appeal. May 20, 1952.

(Somervell, Jenkins and Morris L.JJ.)

THE FACTS.—The plaintiff Sayce issued a writ claiming from the defendant, described as Ameer Ruler of Bahawalpur State, formerly an independent Indian State, damages for alleged breach of contract. The writ was served on the defendant, who entered a conditional appearance to it and took out a summons asking that the writ be set aside. The summons was heard on October 13, 1950, by Master Grundy, who ordered that the service of the writ be set aside on the ground that the defendant was entitled to immunity as the ruler of a sovereign State.

The plaintiff appealed to McNair J. in Chambers, who adjourned the summons into open Court. There was before the Court a letter dated September 4, 1951, from the Commonwealth Relations Office which stated that until August 15, 1947, his Highness the Ameer of Bahawalpur was recognized by His Majesty as the ruler of that State, which was under the suzerainty of His Majesty; but that the position of the State of Bahawalpur was altered by the Indian Independence Act, 1947, and the Government of India Act, 1935, as modified by the provisions of the Act of 1947. The letter outlined the constitutional position of the Ameer and of his State as a result of an instrument of accession to Pakistan dated October 3, 1947, and certain further instruments (one dated April 29, 1951) which the Ameer had executed in pursuance of section 6 of the Government of India Act, 1935 (as modified), which created a Federation to consist of the territories of the Dominion

of Pakistan and such Indian States as might accede to the Federation under section 6. The final paragraph of the letter stated:

“ In these circumstances I am to say that the State of Bahawalpur is not a part of His Majesty's Dominions, and that the Ameer, within the limitations imposed upon him by the constitutional arrangements set out above, is sovereign ruler of the State.”

McNair J. affirmed the finding of the Master. In his view, the statement of the Commonwealth Relations Office precluded him from considering the difficult question of the status of component parts of the Federation, or how far the recognition accorded in the present case was consistent with the recognition accorded to Pakistan as reported in *Kahan v. Pakistan Federation* ([1951] 2 K.B. 1003). His Lordship relied on the decision of the House of Lords in *Duff Development Co., Ltd. v. Government of Kelantan* ([1924] A.C. 797).

The plaintiff appealed.

Held: That the appeal must be dismissed and the order setting the writ aside be allowed to stand. The question whether a ruler of a State was entitled to immunity was one for determination by His Majesty's Government and not by the Courts. The Commonwealth Relations Office was the appropriate governmental department in this case, and the Court was bound to treat the letter from that Department as decisive.

Somervell L.J. stated the facts and continued: “ Before I deal with the facts I propose to read one or two passages, on which the learned Judge relied in his judgment, from the decision of the House of Lords in *Duff Development Co., Ltd. v. Government of Kelantan* ([1924] A.C. 797, 808, 815), which was, of course, the well-known case which raised a question with regard to the immunity of the State of Kelantan. Lord Cave said: ‘ No doubt the engagements entered into by a State may be of such a character as to limit and qualify, or even to destroy, the attributes of sovereignty and independence: Wheaton, 5th ed., 50; Halleck, 4th ed., 73 and the precise point at which sovereignty disappears and dependence begins may sometimes be difficult to determine. But where such a question arises it is desirable that it should be determined, not by Courts, which must decide on legal principles only, but by the Government of the country, which is entitled to have regard to all the circumstances of the case. Indeed, the recognition or non-recognition by the British Government of a State as a sovereign State has itself a close bearing on the question whether it is to be regarded as sovereign in our

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Courts.' Then he refers to the declaration in that case. Lord Finlay said: 'It might be said that there was a want of candour in merely stating the conclusion that the power is a sovereign power without disclosing any such limitations on the sovereignty as exist here. The contention that by appending "these documents"—they were treaties and acknowledgments between His Majesty's Government and the Ruler of Kelantan—the Colonial Office remits the question to the Court to form its own opinion upon it, is based on a misconception. When the letter and the documents are read together it is clear that the Secretary of State says explicitly that the Sultan is a sovereign ruler, and the documents are appended by way of making it clear that their effect has been considered and that the Colonial Office has given all due weight to them in arriving at the conclusion that the Sultan is a sovereign prince.' He then, after considering the limitations of sovereignty, says this: 'While there are extensive limitations upon its independence, the enclosed documents do not negative the view that there is quite enough independence left to support the claim to sovereignty. But, as I have said, the question is not for us at all; it has been determined for us by His Majesty's Government, which in such matters is the appropriate authority by whose opinion the Courts of His Majesty are bound to abide.' Lord Sumner in his speech in that case expressed a somewhat different view, or, at any rate, he contemplated that, in the absence of any clear answer from His Majesty's Government, the Court would proceed on legal principles.

"That difference of approach was considered in the *Government of the Republic of Spain v. S.S. Arantzazu Mendi* ([1939] A.C. 256, 263), a case in which immunity was claimed which turned on the question as to which of the rival Governments of Spain at that time was recognized as the *de facto* Sovereign of a certain area. The question, of course, does not help us, but Lord Atkin in his speech said: 'On the question whether the Nationalist Government of Spain was a foreign sovereign State, Bucknill J. took the correct course of directing a letter, dated May 25, 1938, to be written by the Admiralty registrar to the Secretary of State for Foreign Affairs, asking whether the Nationalist Government of Spain is recognized by His Majesty's Government as a foreign sovereign State. I pause here to say that not only is this the correct procedure, but that it is the only procedure by which the Court can inform itself of the material fact whether the party sought to be impleaded, or whose property is sought to be affected, is a foreign sovereign State. This, I think, is made clear by the judgments in this House in the *Kelantan* case ([1924] A.C. 797). With great respect I do not accept the opinion implied in the

speech of Lord Sumner in that case that recourse to His Majesty's Government is only one way in which the Judge can ascertain the relevant fact. The reason is, I think, obvious. Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our sovereign has to decide whom he will recognize as a fellow sovereign in the family of States; and the relations of the foreign States with ours in the matter of State immunities must flow from that decision alone.' In that case, as in the *Kelantan* case ([1924] A.C. 797), the Court was dealing with State immunity as distinct from the personal immunity of a ruler, but in my opinion the principles laid down there with regard to the proper approach to a case of this kind and the necessity for the Court to obtain and act on information from His Majesty's Government in the United Kingdom are applicable.

"In this case communication was made to and answers were received from the Commonwealth Relations Office. Mr. Chinna Durai put before us a clear argument distinguishing this case from the earlier cases, and he sought to distinguish the letter in this case from the letters which were referred to in earlier cases on two grounds. In the first place, he submitted, I think, that the Commonwealth Relations Office has not the authority or the finality in this regard of the Foreign Office with regard to foreign countries, or as the Secretary of State for India had with regard to questions within his jurisdiction, or the Colonial Secretary with regard to Colonial matters. He also—and I shall have to come back to this—submitted that the letter on its face was unsatisfactory and the conclusions in it inconsistent with the earlier matters referred to, and in any case on one particular matter he invited us to seek further information. I will deal with the first point before I come to the latter point.

"I think that the Commonwealth Relations Office are the proper Ministry in this country for this Court to approach and to inform this Court in a matter such as that with which we are concerned, namely, the question of a ruler—and I do not beg any question by calling him a ruler—the limitations on whose sovereignty—and it is admitted there are some limitations—arise out of his relations with the Dominion of Pakistan. Nor do I think there is any ground for criticism in the fact that the Commonwealth Relations Office, having been approached by this Court, communicated to this Court, among other things, the views of the Pakistan Government. That Government had come to an arrangement, as will be seen, with the Ruler of Bahawalpur State, and I think it would be contrary to all principles of the Commonwealth that they should not

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be communicated with. I think they were in an authoritative position to assist the Court, through the Commonwealth Relations Office, in the decision of this question. Coming to the letter, it states at the outset (and this is not disputed) that prior to 1947 His Highness, that is the defendant, was recognized by the Government of India 'as the Ruler of the State of Bahawalpur, which was under the suzerainty of His Majesty. The territory of the State was not part of British India or of His Majesty's Dominions and neither the Ameer nor his subjects were subjects of His Majesty'. Then there is a reference to the case of *Statham v. Statham and the Gaekwar of Baroda* ([1912] P. 92) in which it was held that the then Gaekwar of Baroda was a sovereign prince and immune from procedure, and prior to 1947 the present defendant would have been in the same position. The letter then proceeds to go through the constitutional changes which have happened since 1947 with references to the Government of India Act, 1935, which, as modified, is still operative in Pakistan. The letter concludes with this paragraph: 'In these circumstances I am to say that the State of Bahawalpur is not a part of His Majesty's Dominions, and that the Ameer, within the limitations imposed upon him by the constitutional arrangements set out above, is sovereign ruler of the State'.

"Having come to the conclusion that on the facts of the present case the statement by the Commonwealth Relations Office is in precisely the same position as the statements referred to in the earlier cases, that would seem to dispose of the matter and to justify the learned Judge's conclusion, but out of deference to the argument I will deal, as indeed in most of the other cases the Court has dealt, with the various matters which determine the position of the ruler and where, in this class of case, the limitations of sovereignty are to be found. They are referred to in the letter. I agree with the learned Judge when he says: 'In my judgment the final paragraph of the letter of September 4, 1951, contains a clear and unequivocal statement made on behalf of His Majesty on two points: (1) that the State of Bahawalpur is not part of His Majesty's Dominions, and (2) that the Ameer within the limitations imposed upon him by the constitutional arrangements set out in the letter is sovereign ruler of the State'.

"I now come to the history of the changes. By the Indian Independence Act, 1947, as from August 15, 1947, two independent Dominions were to be set up in India to be known respectively as India and Pakistan. I should, in passing, refer to section 2 (4), which says: 'Without prejudice to the generality of the provisions of sub-section (3) of this section, nothing in this section shall be construed as preventing the accession of

Indian States to either of the new Dominions.' We are concerned only with Pakistan. [His Lordship then read section 7 of the Act of 1947¹ and continued:] Under this Act it was provided that the Government of India Act, 1935, applied in the Dominion with such modifications as should be made according to the terms of the Act.

"We have before us the Government of India Act, 1935, as adapted by the Pakistan Provisional Constitution Order. There was a Governor-General appointed by His Majesty by warrant of the Royal Sign Manual. Part II refers to the Federation of Pakistan. That adopted and adapted the provision to Federation by the Indian States which was contained in the Act of 1935, though that Federation never became effective. It provides that 'As from the fifteenth day of August, 1947, there shall be united in a Federation by the name of Pakistan (a) the Provinces hereinafter called Governor's Provinces, (b) the Provinces hereinafter called Chief Commissioners' Provinces'—with which we are not concerned—and 'such Indian States as may accede to the Federation in the manner hereinafter provided'. Bahawalpur did accede and there was an earlier Instrument of Accession and a later Instrument of Accession. One of the questions to which the learned Judge addressed his mind was whether he had to consider the matter as at the date of the writ or as at the date of the hearing before him. That was relevant, because undoubtedly the powers parted with under the second or supplemental Instrument of Accession, which was after the writ, are greater than those parted with under the earlier Instrument. The learned Judge decided that he ought to address his mind to the position as at the date of the hearing, that is, after the later Instrument of Accession, and that was not challenged before us and I will therefore adopt the same principle.

"Turning to the supplementary Instrument of Accession, that proceeds on the not unfamiliar lines of having a schedule in three parts setting out the various possible subjects of legislation. In Part I are the subjects which are exclusively Federal subjects; in Part II are the subjects which are *prima facie* concurrent subjects for legislation; and Part III, subject

¹ Indian Independence Act, 1947, section 7: "(1) As from the appointed day—(a) His Majesty's Government in the United Kingdom have no responsibility as respects the Government of any of the territories which, immediately before that day, were included in British India; (b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise."

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to certain powers, *prima facie* State subjects. Mr. Chinna Durai rightly drew attention to the fact that under this Instrument the ruler is declaring that 'any change which may be made hereafter by competent authority in the aforesaid lists, in their application to the Federation of Pakistan, shall have effect in relation to this State in such wise that the respective Part of the said Schedule shall be deemed to have been modified, in like manner as the corresponding list, and with effect from the same date'. Of course, such a change might radically alter the position, but we have to consider the matter before any such change has been made. There was a further agreement with regard to possible future alterations of the provisions of the Constitution Act. Paragraph 9 says: 'Nothing in the Second Supplementary Instrument affects the continuance of my sovereignty in and over this State, or, in exercise of any powers, authority, rights and jurisdiction now enjoyed by me as ruler of this State or the validity of any law at present in force in this State, save as provided by the Second Supplementary Instrument.'

"It is unnecessary, in my view, to go through the various subjects in Part I and Part II or in any detail in Part III, but in Part III, which are *prima facie* State subjects, one finds public order (excluding the use of His Majesty's naval, military or air forces in aid of the civil power); the administration of justice; constitution and organization of all Courts, except the Federal Court; police; prisons; compulsory acquisition of land; local government and public health. In my opinion there is ample justification in that document for the learned Judge's conclusion that 'An examination of the Constitutional arrangements set out in the letter satisfies me that today the limitations imposed upon the Ameer's sovereignty have no application over a very substantial sphere.' In making this examination I am being in no way inconsistent with the principles which I cited from the *Kelantan* case ([1924] A.C. 797). In that case they also examined the relations which existed between His Majesty's Government and the Government of Kelantan, and it is proper, I think, that they should be explained and in any necessary document set out by the relevant Government department to assist the Court. It enables one to see that the proper matters have been considered and have been before the proper Ministers.

"That, I think, disposes of the argument, except with regard to one matter which was raised before the learned Judge and before us. On April 30, 1950, which was some eight days before the Supplementary Instrument of Accession to which I have been referring, there was passed the Pakistan Citizenship Act, 1951. It provided for Pakistan citizenship,

and by section 13 it said: 'If any territory becomes a part of Pakistan the Governor-General may, by order, specify the persons who shall be citizens of Pakistan by reason of their connection with that territory; and those persons shall be citizens of Pakistan from such date and upon such conditions, if any, as may be specified in the order. (15) Every person becoming a citizen of Pakistan under this Act shall have the status of a Commonwealth citizen.' The Act here which deals with that matter now is, of course, the British Nationality Act, 1948. The Pakistan Citizenship Act was referred to also in the letter, and the letter proceeds on the basis which would be favourable to Mr. Chinna Durai's argument: 'Under the Pakistan Citizenship Act, 1951, the subjects of the Ameer have now in general also become citizens of Pakistan, while remaining subjects of the ruler.'

"They have, therefore, two citizenships: their local citizenship under which they owe allegiance to their ruler, and they also are Pakistan citizens with its consequential status under the Act of 1948 as British subjects or Commonwealth citizens. At one time Mr. Chinna Durai argued that we ought to assume that under that Act the ruler has himself become a citizen of Pakistan. That is not stated in the letter, and I cannot think that that would be the result. But assuming that it was so and he became a Pakistan citizen, it seems to me that it would be impossible to regard that as affecting his status as declared in the revised Instrument of Accession signed only some eight days later. The position, of course, in this case, as in so many of the earlier cases which have come before the Courts, is *sui generis*, but I can find nothing in any of these documents, or in the Citizenship Act, which would lead this Court to decide against the general principle upon which the House of Lords has stated our Courts must act, namely, to accept as final, in a matter of this kind, the declaration of the appropriate Government department. For these reasons I would dismiss the appeal."

Jenkins and Morris L.JJ. agreed.

[Report: L.R. [1952] 2 Q.B. 390.]

Case
No. 46

Jurisdiction—Territorial—Exemptions from—Foreign Visiting Forces—Forces of Another Member of British Commonwealth—Visiting Forces (British Commonwealth) Act, 1933.

REEVES *v.* DEANE-FREEMAN.

England, High Court of Justice, Queen's Bench Division.

(Lord Goddard C.J.)

July 23, 1952.

THE FACTS.—The plaintiff claimed damages for negligence in respect of injuries sustained in a collision on November 14, 1946, between the plaintiff riding a motor-cycle, and a Canadian Army lorry driven by the defendant, a member of the Canadian Army, in the course of his duty. The writ was issued on December 2, 1949.

It was argued for the defence that the claim was barred by the Limitation Act, 1939, section 21 (1), as it had not been brought within one year of the date on which the cause of action accrued. It was argued for the defendant that a soldier on duty is not entitled to the protection of section 21 (1) of the Act, as a person acting in pursuance of a public duty or authority; and that even if he were, it would not apply to a member of the Canadian forces.

Held: that the defendant was protected by the Limitation Act, 1939, section 21 (1), and the claim, being out of time, accordingly failed. Lord Goddard said:

“In my opinion, the second point raised by the plaintiff is concluded in the defendant's favour by section 2 (3) (b) of the Visiting Forces (British Commonwealth) Act, 1933, the object of which, as it seems to me, is to put members of the forces of the British Commonwealth while in this country in precisely the same position as members of the home forces. The words of the section on which reliance is placed are these:

“‘Subject as hereinafter provided, any enactment (whether contained in the Naval Discipline Act, the Army Act, the Air Force Act or any other statute) which . . . (b) in virtue of a connection with the home forces or any of them, confers a privilege or immunity on any person . . . shall, with any necessary modifications, apply in relation to a visiting force as it would apply in relation to a home force of a like nature to the visiting force.’

“If, therefore, a home force is to be regarded as a public authority, a visiting force is to be equally so regarded.”

His Lordship then considered whether a soldier on duty came within section 21 (1) of the Limitation Act, 1939, and concluded that he did.

[Report: [1952] 2 All E.R. 506.]

NOTE.—The Visiting Forces (British Commonwealth) Act, 1933, is now replaced by the Visiting Forces Act, 1952.

**Jurisdiction—Exemption from—Armed Forces—Foreign Case
Vessels of War—Crimes Committed Ashore by Members of No. 47
Crew on Shore Leave.**

JAPAN *v.* SMITH AND STINNER.

Japan, District Court of Kobe. August 5, 1952.

High Court of Osaka (Sixth Criminal Division).

(Toshihiro Oka (Presiding Judge); Masao Kunimasa and Hiroe Ishimaru (Associate Judges).)

November 5, 1952.

THE FACTS.—The accused were sailors belonging to the British warship *Belfast* which in June 1952 arrived in the port of Kobe on a visit. On June 28 1952 while they were on shore leave, they assaulted a taxi driver, stole his money and drove the taxi away. They were arrested and convicted of robbery. They appealed, pleading, *inter alia*, that the Japanese Courts had no jurisdiction seeing that appellants were members of the crew of a foreign warship.

Held: that the appeal must be dismissed.¹ The Japanese Courts had jurisdiction over the accused. The Court said:

“Article 338 (1) of the Code of Criminal Procedure provides that ‘where a Court has no jurisdiction over the accused, the charge shall be dismissed’. It is obvious that this provision indicates the existence of a criminal jurisdiction which is a part of the judicial power provided for in paragraph 1 of Article 76 of the Japanese Constitution, which reads: ‘The whole judicial power is vested in a Supreme Court and in such inferior Courts as are established by law.’ Moreover, there is no provision in the Code of Criminal Procedure which specifies the cases over which the Courts have no jurisdiction.

“It is essential for the independent existence of a State that its sovereignty shall be supreme and, as a rule, that sovereignty extends over the entire territory of the State and governs all persons and things within that territory. In general,

¹ Technically, the superior Court set aside the judgment of the Court below and substituted its own judgment, which rejected the plea to the jurisdiction.

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therefore, the sovereign power affects every person within the territory concerned, regardless of whether he is a citizen of the State or an alien, and this rule can be qualified solely by treaty or other agreement concluded by the State or by the generally accepted rules of the law of nations. Paragraph 2 of Article 98 of the Japanese Constitution provides that 'the treaties concluded by Japan and the generally accepted rules of the law of nations shall be faithfully observed', and since this provision is in Chapter X, which is headed 'Supreme Law', the Court is of opinion that the Constitution itself is qualified by the treaties concluded by Japan and by the established customary law of nations. Not only must these provisions of the Constitution be faithfully observed by Japan with respect to foreign States, but those provisions which relate to domestic matters must also be faithfully observed in Japan by the State organs and by every person in Japan. Accordingly, therefore, the above-mentioned criminal jurisdiction, which is an aspect of sovereignty, extends, in so far as it is not definitely limited, to aliens residing in Japan. In examining the limitations on Japan's criminal jurisdiction, the Court finds that the limitations relating to the United States armed forces which are stationed in Japan in accordance with the Administrative Agreement based on Article 3 of the Security Treaty between Japan and the United States of America, is one that is recognized by a treaty, and that the grant of extraterritoriality with respect to diplomatic envoys, warships, and so on in Japanese territory, is a limitation in accordance with the established customary law of nations. Moreover, it is in principle agreed that if a sailor belonging to a foreign warship goes ashore on official business and, while on that business, commits a crime, his home State has jurisdiction over him. In no other case is there a limitation on Japanese criminal jurisdiction. . . .

"There is certainly no such limitation in a case involving the sailors of a foreign warship who are ashore for their own purposes. The Court takes judicial notice of the fact that no treaty concerning the exercise of criminal jurisdiction over a case like the present has been concluded between Japan and Great Britain, nor is there any such treaty with the States Members of the United Nations, including Great Britain, as such. Most writers on international law, though a few entertain contrary views, admit the home State's jurisdiction over cases of this kind. Such jurisdiction is admitted especially in the Resolution on 'Rules on the Position of Ships and their Crew in a Foreign Port in Peace Time' of the International Law Association of 1928. It is therefore as established principle that the home State has jurisdiction, and the principle has been supported by decided cases in many countries.

Moreover, there is no established international custom which gives jurisdiction to the home country of an accused rather than to the State in which the crime was committed. . . .

" According to paragraph 1 of Article 1 of the Penal Code which provides that ' This Code shall apply to every person who commits a crime within the territory of Japan ', the penal law of Japan is applicable to the present crime, which was committed in the city of Kobe, and the defendants' plea denying the criminal jurisdiction of the Japanese Court on the ground that the accused are sailors belonging to a British warship, must be rejected. . . .

" It was also contended on behalf of the appellants that Japan's criminal jurisdiction in the present case was excluded by the terms of a letter (hereinafter referred to as the Yoshida Letter) dated May 31, 1952, and addressed by the Prime Minister, Mr. Yoshida, to Mr. Murphy, the American Ambassador, relating to incidents involving crimes committed by personnel of the United Nations forces and others. The Yoshida Letter, however, did not take the form of an exchange of notes; it was merely a unilateral notice given by Japan. In it the Japanese Government outlined the policy which it would pursue in regard to criminal incidents involving personnel of the United Nations forces pending an agreement between Japan and the Member States of the United Nations. That Letter does not, therefore, have the legal effect of a treaty or other agreement between States. Moreover, the principal points laid down in the Yoshida Letter were, in effect, as follows:

- (1) The exercise of jurisdiction over personnel of the United Nations forces shall be governed by the rules of international law and international custom.
- (2) If the rules regarding crimes committed outside the area in which the individual concerned is stationed are uncertain, each case shall be the subject of consultations between the Japanese Government and the State concerned.
- (3) Personnel of the United Nations forces who are arrested by the Japanese authorities on criminal charges shall, as a rule, and except in the cases mentioned in (4) below, be handed over to the authorities of the military formations to which they belong.
- (4) In any case of special importance, the consultations mentioned in (2) above shall take place immediately. In the meantime, the accused shall remain in the custody of the Japanese authorities. If a decision is not reached within forty-eight hours, the Japanese authorities shall endeavour to hand over the accused to the military authorities of his home State on condition that he shall be handed back to the Japanese authorities at some later date.

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If a case such as the present one arises, then, according to the Yoshida Letter, (a) when it is clear that there is no uncertainty in the relevant established rules of international law and custom, the case is to be treated according to paragraph (1); (b) if such rules are uncertain, it must be referred for consultation with Great Britain; (c) if the accused is arrested as mentioned in paragraph (3), and there is no special and important question involved, the accused should be handed over, as a rule, to the military authorities of his home State; and (d) if a special and important question exists, the Japanese authorities shall deliberate on the matter, keeping the accused in custody, and, if no decision is reached within forty-eight hours, efforts should be made to hand over the accused to the military authorities of his home State on the condition mentioned in paragraph (4). The Yoshida Letter stated, moreover, that the Japanese Government intended to take the above-mentioned measures and to put them into effect immediately. The effect of all this, however, was no more than that the Japanese Government would take certain administrative measures in these cases; there was no intention to limit the exercise of the jurisdiction of the Japanese Courts.

"Therefore the jurisdiction of the Japanese Courts has not been affected by the Letter. Accordingly, if the prosecuting authorities, in instituting the present public action, had neglected to comply with the provisions of the Yoshida Letter, they might have been open to the charge of having failed to consult with the British authorities, contrary to the spirit of the Letter. Since, however, a prosecution had been commenced, the Court must carry out its duty according to conscience. The Court is bound only by the Constitution and the laws, which include the treaties concluded by Japan and the established law of nations, as laid down in paragraph 3 of Article 76 of the Japanese Constitution.¹ Japanese Courts are not bound by the Yoshida Letter, which is neither a treaty nor an agreement between States. For the above reasons this contention must be rejected."

It was also contended on behalf of the appellants that the Court of first instance had no jurisdiction over the accused for the following reason. The offence with which the accused were charged was committed by sailors belonging to the occupation forces within ninety days after the coming into force of the Treaty of Peace with Japan in 1952, *i.e.*, the period of withdrawal, and the position of the occupation forces during that period should be treated as corresponding to the position of diplomatic

¹ Article 76 (3) of the Japanese Constitution lays down as follows: "3. All Judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws."

envoys who have terminated their mission. There was no reason why the privileges of the former occupation forces should be withdrawn immediately. During that period, therefore, Japan had no jurisdiction over members of the former occupation forces.

"However, the term 'occupation forces of the Allied Powers' mentioned in Article 6 of the Treaty of Peace with Japan was used to indicate the land, sea and air forces which were engaged in the occupation of Japan in and about the Japanese territories at the time of the coming into force of the Peace Treaty. Therefore, if a warship which was engaged in any other duty at that time had been visiting Japanese territory, there would have been no reason to grant to the warship and its crew the same privileges as were accorded to the former occupation forces. According to the testimony of the accused, the *Belfast* was engaged in action in Korean waters from the time before the coming into force of the Peace Treaty [April 28, 1952] until just before her visit to Kobe. On the other hand, no evidence was brought to show that the warship, which admittedly belonged to the occupation forces, was engaged in the occupation of Japan and was preparing to withdraw on the termination of its duties. Therefore, under the provisions of the agreements relating to the stationing of foreign armed forces in Japanese territory, as provided in Article 6 of the Peace Treaty, the said warship is bound by the rules mentioned above. Consequently, this contention also must be rejected.

"It was further contended on behalf of the appellants that Japan was negotiating with Great Britain for certain 'Agreements on the United Nations Forces' which would govern the treatment of British forces stationed in Japan as members of the United Nations forces, and that it was contrary to international practice to assert Japanese jurisdiction and to decide a case pending such negotiations. If this argument were accepted and the jurisdiction of Japan held to be excluded in these circumstances, the result would be that neither Japan nor Great Britain would be in a position to exercise jurisdiction over the accused. Such a result would be absurd and impracticable. The contention must therefore be rejected. There is no reason in international law why, even in the middle of negotiations, the Japanese prosecuting authorities should not exercise the right to institute proceedings against the accused, nor why the Japanese Court should not adjudicate in the case. It can hardly be said that the negotiations would have been prejudiced *ab extra*. From this point of view also, the argument of the defence must be overruled.

"Since it has been clearly established that the Kobe

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District Court had jurisdiction over the place where the acts complained of were committed, and since there was no reason to decline jurisdiction over the accused, the Court of first instance was correct in not dismissing the present action [for want of jurisdiction] and, moreover, this Court to which the case was brought on appeal similarly finds no reason to dismiss the action [on that ground]."

[Unreported.]

II.—Personal

i.—Over Nationals in respect of Crimes Committed Abroad

Case
No. 48

Jurisdiction—Over Nationals for Crimes Committed Abroad
—Prosecution of National for Crime Committed while an Alien—The Law of the Netherlands.

X. *v.* PUBLIC PROSECUTOR.

Holland, District Court of Middelburg. February 15, 1952.
Court of Appeal of The Hague. March 26, 1952.

THE FACTS.—X., a Netherlands citizen who had married an alien and thereby lost her nationality, committed outside the Netherlands a criminal offence for which she was prosecuted and convicted in the country where the offence was committed. Subsequently, her marriage was dissolved and she applied for and recovered her former Dutch nationality. She was thereupon prosecuted by the Netherlands Public Prosecutor for the same offence. She applied to the District Court to have the prosecution stayed under Article 262 of the Code of Criminal Procedure. Under Article 5 (1) of the Netherlands Criminal Code, Netherlands criminal law applies to Netherlands subjects who commit outside the Kingdom an offence which is regarded in the Netherlands as a crime (*misdrif*) and is also punishable under the criminal law of the country where it is committed.¹ Under Article 5 (2), a person who commits such an offence can be prosecuted if and when he subsequently becomes a Netherlands citizen.

Held (by the District Court): that the application must fail. The provision of Article 5 (2) applied equally to cases in which an alien became a Netherlands citizen after committing an

¹ Since the jurisdiction of the Netherlands Courts, or the possibility of a prosecution in Holland, is by this provision made dependent upon the question whether a particular offence is also punishable under foreign criminal law, the Courts may have to interpret foreign law. Since, however, the duty of the Supreme Court is only to control the correct interpretation of Netherlands laws, an appeal in cassation on the ground that the Court below has wrongly interpreted the foreign penal law, must fail. *Cf.* the judgment of the Supreme Court of September 23, 1952 (*N.J.*, 1953, No. 1).

offence, whether or not he had ever previously had Netherlands nationality. The appellant's conviction abroad did not preclude a new prosecution in Holland, although it might affect the award of punishment.

On appeal,

Held (by the Court of Appeal): that the appeal must be dismissed.

[Report: *N.J.*, 1953, No. 344.]

ii.—Over Nationals Abroad or on the High Seas and their Property Abroad

Jurisdiction—Over Nationals Abroad—Service of Legal Process on Territory of Foreign State—Nullity of Service. Case No. 49

PUBLIC PROSECUTOR *v.* VAN H.

Holland, Cantonal Court of Oostburg. February 26, 1948.

District Court of Middelburg. June 25, 1948.

Supreme Court. January 22, 1952.

THE FACTS.—Under Articles 383 *et seq.* of the Netherlands Code of Criminal Procedure, a criminal prosecution before a Cantonal Court may be instituted by means of a simple "convocation" instead of a formal writ of summons. The convocation is handed to the defendant by an officer engaged in the tracing of criminal offenders. In this case the convocation had been handed to the accused on Belgian territory. At the hearing of the case, the accused objected that the service of the convocation beyond the realm was invalid.

Held (by the Cantonal Court): that the convocation had not been duly served. The Public Prosecutor appealed.

Held (by the District Court): that the appeal must be allowed. The Articles of the Code in question contained no territorial limitation in respect of this method of summoning. On further appeal (in cassation "in the interest of the law"),

Held (by the Supreme Court): that the service of the convocation on the defendant by a Netherlands officer in a foreign country was null and void. The handing over of a convocation as provided in Article 383, paragraph 3, of the Code of Criminal Procedure was an official act performed by a public servant under the orders of the Public Prosecutor, and had the legal effects attached to it by law. Neither the members of the *ministère public* nor their executive officers had the right to exercise the powers given to them under Dutch public law in the territory of another State. The service of such a

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convocation in Belgium in the absence of an agreement concluded on the matter with that State, lacked, therefore, the normal legal effects attached to it.

[Report: *N.J.*, 1952, No. 146, with a Note by Professor Röling.]

NOTE.—In the following cases the Netherlands Courts considered the principle of the extra-territorial operation of Netherlands criminal law:

Public Prosecutor v. K., decided by the Supreme Court on June 5, 1951, in which the question at issue was whether the Netherlands Law of 1931 (*Staatsblad* No. 476) for the control of the sale of alcoholic drink could be held to apply to an unlicensed, and therefore *prima facie* prohibited, sale of excise-free gin, stored in a Netherlands bonded warehouse, by a ship's Chandler for consumption on vessels abroad. The defendant had been acquitted in the Cantonal Court (decision of January 10, 1950), on the ground that such a sale had nothing to do with the purposes of the Law of 1931, which was intended to protect Dutch social interests, and that it did not come within their territorial scope. The acquittal was upheld by the District Court of Rotterdam (decision of June 20, 1950), but reversed by the Supreme Court, which held strictly to the wording of the Law. [Report: *N.J.*, 1952, No. 7.]

Rotterdamse Kustvaart-Centrale v. Lenter, decided by the District Court of Rotterdam on January 16, 1952, concerning a charter party signed in New York which did not bear the stamp required for such documents under the Netherlands Stamp Law. When objection was taken to its production in a Dutch Court, it was *held* that the Stamp Law was fiscal legislation which did not operate outside the country. [Report: *N.J.*, 1953, No. 235.]

Public Prosecutor v. van de Weerd, decided by the Cantonal Court of Wageningen on September 25, 1952, in which an inspector of a motor-bus company was prosecuted for having allowed one of their drivers to drive his excursion car for too long without a break for the compulsory rest periods fixed by law. Part of the driving time in respect of which the prosecution was brought was occupied by an excursion from Holland to Paris. It was *held* that the requirement of rest periods extended to time spent in driving in a foreign country. [Report: *N.J.*, 1953, No. 316.]

Jurisdiction—Territorial—Exterritorial Effect of Legislation **Case**
—Jurisdiction over Aliens and Nationals Abroad—Inter- **No. 50**
national Law and Municipal Law—Interpretation of Muni-
cipal Statute in Light of International Law—Public Inter-
national Law and Private International Law—Principle of
Effectiveness—Interpretation of Emergency War Legislation
—The Law of Israel.

AMSTERDAM AND OTHERS *v.* MINISTER OF FINANCE.

Israel, Supreme Court sitting as High Court of Justice.

(Smoira C.J.; Agranat and Rabbi Assaf JJ.)

September 11, 1952.

THE FACTS.—During the years 1951 and 1952, the Minister of Finance, purporting to act under powers conferred upon him by the Defence (Finance) Regulations, 1941, had promulgated a number of orders transferring securities to himself at prices specified (hereinafter called "Transfer Orders") and ordering the surrender to himself of such securities within the time specified (hereinafter called "Surrender Orders"). The validity of these orders was impugned on the grounds, *inter alia*, that they were invalid to the extent that they related to securities situated abroad, *i.e.*, in a place outside the area of jurisdiction of the State of Israel, and that they were invalid in respect to such securities as not only were abroad, but were owned by persons who were, and had been at the dates of the Orders, resident in other States. It appeared that all the securities were in sterling currency, all were deposited with banks or firms abroad and were not in Israel, and some of the petitioners were resident in Israel, others abroad. The following is a summary of the relevant statutory provisions:

A. Under section 1 (2) (b) of the Emergency (Defence) Powers Act, 1939 (hereinafter called "the 1939 Law"), the British Parliament empowered the King in Council to make such emergency regulations as appeared to him to be necessary or expedient for the purpose of, *inter alia*, maintaining supplies and services essential to the life of the community, and as would authorize

- (1) the taking of possession or control, on behalf of His Majesty, of any property or undertaking;
- (2) the acquisition, on behalf of His Majesty, of any property other than land.

By section 3 (the marginal note to which reads "Extra-territorial operation of Defence Regulations"):

- "(1) Unless the contrary intention appears therefrom, any provisions contained in . . . any Defence Regulations shall—
- (a) in so far as they specifically impose prohibitions, restrictions or obligations in relations to ships, vessels or aircraft, or specifically authorize the doing of anything in relation

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to ships, vessels or aircraft, apply to all ships, vessels or aircraft in or over the United Kingdom and to all British ships or aircraft . . . wherever they may be; and

- (b) in so far as they impose prohibitions, restrictions or obligations on persons, apply (subject to the preceding provisions of this sub-section) to all persons in the United Kingdom and all persons on board any British ship or aircraft. . . .”

B. By Article 3 of the Emergency Powers (Colonial Defence) Order-in-Council, 1939, all the provisions of the 1939 Law were extended to Palestine, subject to appropriate modifications, such as: (1) the power to make the Defence Regulations was vested in the High Commissioner; (2) in sub-section (1) of section 3, the word “territory” was substituted for the words “United Kingdom”, wherever appearing.

C. In virtue of the last-mentioned two enactments, the High Commissioner for Palestine made the Defence (Finance) Regulations, 1941 (hereinafter referred to as “the Regulations”). The powers which the Regulations formerly vested in the High Commissioner for Palestine have devolved, under sections 14 (a) and 2 (d) of the Law and Administration Ordinance, 5708-1948, upon the Israel Minister of Finance. Included in the Regulations are the following relevant provisions:

- (1) In Regulation 2, the term “owner”, in relation to a security, is defined as including, unless the context otherwise requires, “any person who has power to sell or transfer a security, or who has the custody thereof, or who receives, whether on his own behalf or on behalf of any other person, dividends or interest thereon. . . .”; “security” is defined as including, except in so far as is otherwise expressly provided, “(a) shares, stocks . . . notes, debentures, debenture stock and Treasury bills; (b) a deposit receipt in respect of the deposit of securities. . . .”
- (2) By Regulation 7 (1) (a), the Minister of Finance may by order direct that, subject to any exemptions for which provision may be made by the order, no person shall, except with his permission, sell or transfer securities of any such class as may be specified in the order, being a class of securities which, in the opinion of the Minister of Finance, are likely to be marketable abroad. Under paragraph (b), he may direct that the owner of any securities of the said class shall make a return in respect thereof in such manner and within such time as may be specified in the order.
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D. Sections 11, 14 (a) and 2 (d) of the Law and Administration Ordinance, 5708-1948, provided for the revitalization in Israel of the Mandatory legislation, such revitalization being, by section 11, “subject to such modifications as may result from the establishment of the State and its authorities”. The result was that the authority referred to in section 1 (2) (b) of the 1939 Law—for the acquisition of property on behalf of His Majesty—

became authority to acquire property on behalf of the State of Israel. The "territory" referred to in section 3 of the 1939 Law became the area of the State of Israel. "Israel" was substituted for "Palestine" wherever appearing, and the powers formerly vested in the High Commissioner devolved, as from the establishment of the State, upon the Minister of Finance.

Held: that the transfer and surrender orders were valid in so far as they related to foreign securities belonging to residents of Israel, and were not invalid in so far as they related to foreign securities belonging to foreign residents. A State does not possess legislative authority over property situated outside the area of the State when the owners are residents of another State. Judgment was given by Agranat J., who said:

"From the contentions of the parties it is clear that the principle of territorial sovereignty—the cornerstone of the Anglo-American legal system—is the pivot on which the main controversy between them revolves. In *Gordyal Singh v. Rajah of Farikdote*, [1894] A.C. 670, Lord Selbourne defined this principle as follows:

'All jurisdiction is properly territorial, and "*extra territorium jus dicenti impune non paretur*". Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land with the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who were living when domiciled, within the territory . . . no territorial legislation can give jurisdiction which any foreign Court ought to recognize against foreigners, who owe no allegiance to the power which so legislates.'

"The principle—the gist of which is that every State has power over persons and property situated within its territory, but not (except in a few cases) over persons and property outside the same—is emphasized and insisted on by successive judges and writers. There is no need to multiply quotations from these sources, and we may content ourselves with referring to Lord Ellenborough's *dictum* in *Buchanan v. Rucker* (1808): 'Can the island of Tobago possess a right to pass laws to bind the whole world?', the judgments of Lord Halsbury in *Macleod v. A.G. for New South Wales*, [1891] A.C. 456 and Lord Esher in *Colquhoun v. Heddon*, [1890] 25 Q.B.D. 129, and the remarks on this subject in Maxwell, on the *Interpretation of Statutes*, 9th ed., p. 148, and Hailsham, Vol. XXXI, pp. 518 *et seq.*

"In the United States, this idea of territorial jurisdiction was proclaimed by the eminent judge and jurist Story, who derived it from a treatise of the Dutch scholar Huber (*De*

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Conflictu Legum). On the basis of this idea, Story developed the following propositions:

- (1) Every State has exclusive sovereignty and authority within its own territory.
- (2) Therefore, the laws of any State affect and bind directly all the property, movable and immovable, situated within the territory of that State, all the persons living therein, whether native or foreign subjects, and all the contracts and acts made or done therein.
- (3) On the other hand, no State has power to bind directly—by means of its laws—property situated outside its borders or persons not living within its area, whether native subjects or not.
- (4) Story indeed agrees that every State has power to impose its laws on its subjects wherever they may be—even if they are outside its territorial boundaries—but he stresses that this principle is an exception to the preceding rules.

(The full text of Story's above propositions is quoted in Lorenzen, *Selected Articles on the Conflict of Laws* (1947), p. 2.)

"As stated, the above-mentioned rule—that every State has power over such persons and property as are within its borders, but not over those outside it—was the main basis of the arguments of the petitioners. . . . In order fully to comprehend this rule and to establish whether—and to what extent—it affects the matter before us we must first clarify the following points:

"A. We are concerned with the power of the legislative authority in the field of creation and abrogation of rights. The first question to be discussed is: Does the legislative authority have power, as aforesaid, in respect of property situated outside the area of the State (a) when the owners are residents of that State, and (b) when they are living in another State?

"From the point of view of positive *municipal* law, there is no limit to the power of the State to create (and abrogate) rights in property situated outside its borders or belonging to persons living in another State. Provided the legislative authority has clearly demonstrated its intention that the law which it has enacted shall have extraterritorial effect, the *local* Court will have to give judgment assigning to it, the said Law, effect as aforesaid, that is to say, to ignore completely the restrictions imposed by the principle of territorial sovereignty. 'If A is a sovereign State', says Lorenzen (*op. cit.*, p. 5), 'can it not provide that upon the death of the owner his property, including real estate in State B, shall pass to his heirs in accordance with the personal law of the deceased? . . . It would seem manifest that, unless forbidden by some supra-State authority, a sovereign State, A, has the power, so far as its own Courts are concerned, to determine all jural relations,

including those affecting real property in State B, as its own sense of justice and policy may suggest.' Coke, in his day, held that 'the power . . . of Parliament is so transcendent and absolute that it cannot be confined . . . within any bounds.' At a later date, Blackstone, too, emphasized that 'what Parliament doth no authority upon earth can undo'. ' . . . in the case of the United Kingdom Parliament ', observes the author of the article 'Legislature and Judiciary' in *Modern Law Review*, Vol. 15 (1952), at p. 286, 'it had been clear since the seventeenth century that there were no laws which were beyond the power of Parliament to make or unmake'. Lastly, in the above mentioned case of *Colquhoun v. Heddon*, Lord Esher ruled—his words will be quoted below—that if Parliament has directed that a particular law shall have extraterritorial effect, the English Court is bound to comply with such an express direction.

"We must conclude that, in the absence of a superior code making provision to the contrary, the above-mentioned principle—concerning the unlimited legislative power of the legislative authority—applies also in the State of Israel. This conclusion is important, because the two Mandatory provisions of law here under consideration—section 1 (2) (b) of the 1939 Law and Regulation 7 of the Regulations—derive their validity from a legislative act of the Council of State, *viz.*, the enactment of section 11 of the Law and Administration Ordinance 5708-1948.

"It follows from all this that, if the true meaning of the said two provisions of law is that the Minister of Finance is competent to transfer to himself the ownership of securities situated abroad, whether the owners are living here or are residents of another State, there will be no legal obstacle to this Court recognizing the validity of the said Transfer and Surrender Orders, even though they purport to have extraterritorial effect and notwithstanding that in England, where almost all the securities in question are today situated, the Courts may not assign equal, or any, legal effect to those Orders.

"B. It is a well-known maxim that a municipal statute should—except where its contents require a different interpretation—be interpreted in accordance with the rules of public international law. Does the principle that the legislative power of every State shall be limited territorially derive from the rules of international law? In *Shimshon v. Attorney-General*¹ the late Justice Dunkelblum found that the rules of international law were those rules in respect of which it had

¹ *Shimshon Palestine Portland Cement Factory Ltd. v. The Attorney-General* (*International Law Reports*, 1950, Case No. 19).

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been sufficiently proved that 'the other civilized nations have agreed to them, so that it must be assumed that these rules have been accepted also by that State'. By this test, the answer to the question just formulated by us must be in the negative. Regarding this point, we content ourselves with quoting Professor Cook's opinion, expressed in his book *Logical and Legal Bases of the Conflict of Laws* (pp. 41, 71, 72). That scholar, after thoroughly studying the whole problem, came to the definite conclusion that there exists 'no consensus among civilized countries as to the matter under consideration', and to illustrate his statement he referred to the judgment of the International Court in the *Lotus* case [*P.C.I.J.*, Series A, No. 10].

"In the above-mentioned case of *Singh v. Farikdote*, Lord Selborne added that where an English Court, in a 'personal' action, pronounced a decree against a foreign subject in the latter's absence from England and without his having submitted to the Court's jurisdiction, that decree was 'by international law an absolute nullity'. Further, in *Reg. v. Jameson*, [1896] 2 Q.B. 425, 430, Lord Russell said that the rule requiring every statute to be so interpreted as not to apply to foreign subjects in relation to acts done by them outside the territory of the legislating sovereign State was a rule based upon international law 'by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory'. In the light of the above-quoted remarks, it is clear that the reliance on international law in the two last-mentioned judgments was misplaced.

"C. It is true that in English common law the principle of territorial sovereignty is so deeply rooted as to be now no longer challenged. 'In the construction of our own statutory legislation'—says Mr. Justice Devlin in *Bank Voor Handel v. Slatford*, [1951] 2 All E.R. 779 [*International Law Reports*, 1951, Case No. 40], 'we accept the principle that, unless the contrary is made clear, an Act of Parliament is not intended to have extra-territorial effect'. But one thing should be borne in mind: the reference here is not to a rigid, unbreakable rule, but to a rule of interpretation, which attributes to the legislator the intention that the statute in question shall have territorial effect only. In other words, only where the contents of the law do not, expressly or by implication, otherwise require should the general terms used by the legislator be so interpreted as not to apply to persons or things outside the territorial domain. In *Colquhoun v. Heddon*, the question was discussed whether the words 'any insurance company' occurring in a certain English Act extended, contextually, also to foreign

insurance companies. Denying such a wide construction, Lord Esher said:

‘ . . . Supposing the words “ any insurance company ” stood alone . . . would it or would it not be right to say . . . that those words in an English Act of Parliament would include all foreign insurance companies, wheresoever they might be ? What is the rule of construction which ought to be applied to such an enactment, standing alone ? It seems to me that, unless parliament expressly declares otherwise, in which case, even if it should go beyond its rights as regards the comity of nations, the Courts of this country must obey the enactment, the proper construction to be put on general words used in an English Act . . . is that parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction . . . If, therefore, those words stood alone, I should be of opinion that the insurance companies mentioned must be insurance companies over which our parliament has jurisdiction . . . ’

“ According to Lord Esher’s remarks, the rule that a statute shall not be assigned extraterritorial validity does not apply where the legislator has *expressly* directed otherwise. However, even in the absence of such an express direction, it is impossible that any statute should be given an interpretation limiting its application territorially if the general trend underlying it, and reflected in its various sections as read together, requires a wider interpretation. Thus, Mr. Justice Turner, in *Cape v. Doherty*, said:

‘ This is a British Act of Parliament, and it is not . . . to be presumed that the British Parliament could intend to legislate as to the rights and liabilities of foreigners. In order to warrant such a conclusion, I think that either the words of the Act ought to be expressed, *or the context of it very clear.*’ (Quoted from the judgment in *Reg. v. Keyn*, [1876] 2 Exch. D. 63, p. 210.)

“ In Maxwell’s book too, it is stated that ‘ an intention that a statute shall have extra-territorial operation may be readily collected from the *nature* of the enactment ’ (p. 151).

“ D. The principle of territorial sovereignty, as defined by us, obtains also in the field of private international law; that is to say, the English Court, when applying the rules of private international law, which is part of the common law, will interpret a foreign law on the assumption that the foreign legislator did not intend to give his law extraterritorial validity. . . . ”

The learned Judge here proceeded to analyse the position from the point of view of private international law, reaching the general conclusion that “ the considerations by which the local Court is guided in applying its rules of private international law—whether it adopts a foreign law as part of the

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local law or whether it refuses, by virtue of the principle of territorial sovereignty, to recognize the extraterritorial validity of a foreign law—are generally irrelevant to these proceedings, in which we are called upon to interpret legislation of a purely local character ”.

“ E. Lastly, in interpreting the provisions of the Mandatory legislation, we ought to have regard to the well-known rule—closely bound up with the principle of territorial sovereignty, and like the latter a rule of interpretation—that the legislator is presumed to have been dealing with persons and property over which he had *effective* authority, since it would be futile to presume to exercise a jurisdiction which it (Parliament) could not enforce (Hailsham, Vol. XXXI, p. 519).

“ For the sake of clarity, it will be useful at this stage to summarize our conclusions with regard to the principle of territorial sovereignty.

“ (a) In these proceedings, we are concerned with the legislative power of the State in the field of the creation (and abrogation) of rights in property situated outside its territorial domain—both when the owners are residents of the State and when they are resident outside it.

“ (b) From the point of view of positive municipal law—and in the absence of any prohibition by a superior code—there is no limit to the legislative power of the State in the said field.

“ (c) However, any local law will be interpreted by the local Court in accordance with the principle of territorial sovereignty, which imports that the legislator intended to deal with persons and property situated within, and not outside, the territorial domain of the State.

“ (d) Again, the legislator may, either expressly or by implication, indicate the contrary intention—that is to say, that a particular law enacted by him shall have extraterritorial validity—and the local Court is then bound to give effect to the direction of its legislator.

“ (e) In interpreting a particular law, the local Court should also have regard to the principle that such an interpretation should be given as would assure the effective application of the law, to the greatest possible extent; only from this point of view should the said Court pay heed to private international law, without, however, attaching decisive importance to it.

“ Let us now turn to the provisions of the Mandatory legislation—first and foremost to that contained in section 1 (2) (b) of the 1939 Law. In the cases before us, the Minister of Finance purported to issue Orders under a Defence Regulation made by the High Commissioner, who in making it purported to base himself on an Act passed by the British Parliament on the eve of the Second World War. At the top

of the legislative pyramid stands, therefore, the 1939 Law, and the question is whether in section 1 (2) (b) of that Law the legislator intended to authorize the making of Defence Regulations, and of orders thereunder, for the purpose of enabling the State to acquire property situated outside Palestine. If we find that this question is to be answered in the negative, it will be superfluous to analyse the meaning of the Regulations themselves, for the High Commissioner certainly could not go beyond the scope of the provision under which he made them. In that case we shall have to decide that the said Orders were made entirely without authority. On the other hand, the further question, whether the Regulations themselves—and especially Regulation 7—reveal an intention to grant the Minister of Finance power to acquire securities situated outside the territorial domain of the State, can only arise if we are satisfied that an affirmative answer to the first question is inescapable. The specific question demanding a solution at this stage is, therefore: what is the meaning of the words 'any property' appearing in section 1 (2) (b) of the 1939 Law?

"We do not think that any conclusion can be drawn from the fact that in section 3 (1) (a) the legislator defined the scope of the extraterritorial application of Defence Regulations dealing with the powers of the authorities as to ships or aircraft. It will be remembered that the representatives of the petitioners have contended that this implies the impossibility of extending the exercise of the power conferred by section 1 (2) (b) beyond the area of the State. In our opinion, this is not so. The problem of the power of the local authorities to act in respect of ships or aircraft is of a special kind. For instance, the question of the power vested in a State with regard to a ship flying its flag and situated in the territorial waters of the first State, is a very complicated one. States differ in their approach to these matters, and in the sphere of international law the law of the flag may occasionally clash with the *lex situs* (see, for instance, the chapter entitled 'The Requisitioning of Merchant Ships', in McNair, *Legal Effects of War*, p. 433, and the judgment of Lord Atkin in *Chung Chi Cheung v. Rex* [*Annual Digest*, 1938-1940, Case No. 87]; see also an *obiter dictum* of Lord Wright in *The Cristina* [*ibid.*, Case No. 86]. It seems to us that the special treatment given to this problem by the legislator does not imply—since it is a complicated and special problem—that section 1 (2) (b) is intended to authorize the making of Defence Regulations enabling the acquisition of property within the area of the State, but not outside it.

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“ The words ‘ any property ’ (except immovables), appearing in section 1 (2) (b), are fairly general, and according to their literal meaning extend to movable property of any kind and wherever situated. However, according to the principle of territorial sovereignty we must, on the face of it, ignore the general meaning of those words and limit their application to property as aforesaid situated *within* the borders of the State. Still, we think that such an interpretation would be too narrow and would defeat the objects which the English legislator had in mind. Let us not forget that the said provision was designed for a time of war and other emergency, with a view not only to ensuring the maintenance of essential supplies and services within the State—this object has already been pointed out above—but also to securing ‘ public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war, in which His Majesty may be engaged ’. Is it conceivable, in view of these vital, urgent objects, that Parliament should have intended so to tie the hands of the authority on which the power to make Defence Regulations was conferred as to limit the power of acquisition, *in every case*, to property situated in British territory? Is it logical to conclude—again having regard to the above-mentioned vital needs—that the said power was not intended to be exercised, for instance, for the expropriation of property situated outside the said territory and belonging to British subjects wherever they might be? On the other hand, common sense tells us that it cannot have occurred to the said legislator to grant such a drastic power in respect of property situated in another State and belonging to a foreign resident who was not a British subject. McNair, in his above mentioned book (p. 447), enunciates the proposition that

‘ for the purposes of executive action in time of war or other national emergency the Crown has by virtue of the permanent and personal allegiance owed to it by British subjects a jurisdiction to issue orders to them as to the disposal, in the national interest, of their property, even though it be outside British territory and waters.’

“ True, this proposition does not fit our case *exactly*, as it is not based on any statutory provision, but is grounded solely on the allegiance which a British subject owes to his King. However, there is no doubt that the above approach gives a hint as to the road we should take in seeking a meaning for the expression ‘ any property ’ appearing in section 1 (2) (b). On the one hand, the insistence on the national interest, which is endangered during a war or other national emergency, means that there is no point in limiting the exercise of the power of acquisition to property situated within the area of

the State; on the other hand, where the property is outside it, it is necessary—in order to justify its expropriation on behalf of the State—that there should be a vital bond between the national interest for whose sake that power is exercised and the persons to whom the property belongs.

“ Lord Justice Atkin’s judgment in *Commercial Estates Co. of Egypt v. Board of Trade*, [1925] 1 K.B. 271 [*Annual Digest*, 1923–1924, Case No. 228], brings us still nearer the solution of the problem. In that case, the argument revolved upon the scope of Regulation 2 B of the Defence of the Realm Regulations, 1917, which empowered the authorities to requisition certain commodities against payment of their price to the owners—but not necessarily a price equal to their market value. . . . The Court of Appeal decided, by a majority, that this Regulation did not empower the authorities to requisition goods belonging to a neutral party and which had been brought to England against that party’s will. This is what Lord Justice Atkin said (p. 293):

‘ The claim to seize under the Defence of the Realm Regulations seems to me ill-founded. The words of the Regulations are no doubt wide enough to cover these goods and any goods wherever in the world situate. Some limitation is necessary, and I think that the power given to seize . . . was not applicable to goods of a neutral brought to this country by the order of the British Government against the will of the neutral owner. That the Government should have power to requisition ships of its subject, even when situate abroad and loaded with the goods of neutrals, is one thing; but that the Government should have power to compel the shipowners to convey to this country whatever goods of neutrals are in the ship, and should then have power to seize without full compensation the goods, which in this way alone have come within their jurisdiction, is quite another matter. Neutrals who have not sought the protection of this country, even temporarily, either for themselves or their goods, have no particular interest in the defence of this realm; and I cannot think that it was within the power of the authority making Regulations under the Defence of the Realm Act to make Regulations which affected such neutrals.’

“ In his above reasoning, the learned Judge gave room to the consideration that the application of the English provision might not in every case entail the payment of *full* compensation; we do not think, however, that this detracts from the value of his remarks as providing an analogy to our own case. The essence of his approach appears to us to lie in the requirement that there should be a certain connection between the national interest which the regulation in question is designed to protect and the class of persons affected by the exercise of the power conferred by that regulation. The

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important words—let us quote them once again—are ‘ Neutrals who have not sought the protection of this country, even temporarily, either for themselves or for their goods, have no particular interest in the defence of this realm ’.

“ In our opinion, the latter ground may determine the approach to be adopted by us in defining the power specified in the said section 1 (2) (b). The purposes for which that power was granted, and which are described above, apply *mutatis mutandis* also in the State of Israel after its establishment, and we should therefore attribute to the Israel legislator the intention that that section—and also Regulation 7, made thereunder—should authorize also the acquisition of property situated abroad and belonging to the category of persons who theoretically have a concern in the national interest represented by the above-mentioned purposes or by one of them. It is clear that this latter category included also mere residents of the State, since they, too, as Mr. Justice Blackburn said in *Schisby v. Westenholz*, L.R. 6 Q.B. 155, owe to the State, so long as they reside in it, temporary allegiance: they derive benefit from its laws, which protect them and are thus binding on them (*ibid.*, p. 161).

“ We therefore have to conclude that the provision of section 1 (2) (b), and also that of Regulation 7, apply to the securities belonging to those petitioners who were residents of the State at the time when the Orders in question were made; on the other hand, neither of the two provisions applies to the securities belonging to the petitioners in the other cases. As for those petitioners, one of them had left the country even before the establishment of the State and has since been residing in the United States, where he has long ago submitted his ‘ first papers ’, while the other is an Iraqi national who at all material times—so the representatives of the parties have agreed for the purpose of this application—was a foreign resident. If it is contended that the two persons here involved are Jews who found shelter in Palestine after their immigration from Germany and Iraq, and that there is a great difference between their obvious concern in the national interest of the State of Israel and the absence of any concern on the part of that Egyptian company in the national interest of Britain, then our opinion is that such a consideration belongs exclusively to the ideological-political sphere, and not to the rules of positive law which we are called upon to apply since the establishment of the State of Israel. From the point of view of these rules, we are compelled to regard the laws of Israel as binding only on nationals and residents of the State and enacted solely for the benefit and enjoyment of these, and not—except as otherwise expressly

provided in the Law in question—as binding on or enacted for the benefit and enjoyment of Jews who are nationals or permanent residents of another State.

“There is one thing more. It may be asked whether section 1 (2) (b) is not designed for the expropriation of property, including securities, which, though belonging to foreign residents, is situated *within* the area of the State, and whether, if that is so, this does not invalidate the test according to which the owners have to be concerned in the national interest of the State. The answer to the first part of the question is: the section undoubtedly authorizes the making of Defence Regulations enabling also the expropriation of securities of the said category. Moreover, it is not illogical to conclude that the said test does not apply to securities situated within the State whose owners are foreign residents. It must be understood that for this reason—because he did not see any connection between the interest of foreign residents and the vital interests of the Mandatory Power—the High Commissioner saw fit to include in the Regulations of 1939 and 1940 an express provision, *viz.*, the provision of Sub-regulation (6) of the former Regulation 7, forbidding the expropriation of securities belonging to persons who, since September 8, 1939, had not been living in Palestine. In the critical year 1941 the approach was changed, and a different method adopted, according to which that provision was not included in the new Regulations made at that time, but the High Commissioner was empowered to exempt various persons, *inter alia*, foreign residents, from the application of orders made by him under Regulation 7. It will be remembered that the Attorney-General has contended that the omission of the earlier provision from Regulation 7 of the 1941 Regulations implies that the authorities are now permitted to expropriate also securities belonging to residents of other countries. This contention is only partly correct, *viz.*, to the extent that the reference is to foreign residents whose securities are *within* the area of the State. On the other hand, such conclusion—and this is the answer to the second part of the above question—does not invalidate the said test. Regarding property situated within the area of the State, there is no doubt whatever—in the light of the principle of territorial sovereignty—concerning the power of the State to deal with such property wherever its owners may be. The difficulty arises only when the securities are situated in a foreign State; in that case, recourse must be had to that test. . . .

“We still have to examine the scope of Regulation 7 from the point of view of the other petitioners, that is to say, to ascertain whether the purpose reflected in it is consonant with

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that underlying section 1 (2) (b) of the 1939 Law—if the Regulation is designed to permit the expropriation of securities situated outside the area of the State, but belonging to owners who are local residents.

“As to this, everyone knows that the object of the 1941 Regulations, including Regulation 7, was to ensure—during a period of emergency and in the light of the general purposes described above—the creation of a pool in which the Government might, to the greatest possible extent, concentrate assets in foreign currency, with a view to increasing the purchasing power of the State abroad, so as to enable it there to acquire commodities and material essential to those general purposes. Regulation 7 itself alludes to the said object by stating—in Sub-regulation (1)—that the reference is to securities likely to be marketable outside Israel, that is to say, in the main, securities in foreign currency; it also states—in Sub-regulation (2)—that the Minister of Finance may transfer to himself securities if he is of the opinion ‘that it is expedient so to do for the purpose of strengthening the financial position of Israel’. The connection between this specific purpose and the general purpose of, for instance, maintaining the supplies and services essential to the life of the community, leaps to the eye. In his testimony before us, Mr. Y. M. Brin, Deputy Controller of Foreign Exchange, has indicated the financial straits in which the State found itself at the time when the said Orders were made, and he has also said that they were made after an agreement had been reached between Israel and the United Kingdom under which the latter consented to permit the sale of sterling securities deposited with English banks, and the use of their countervalue in free sterling, only within the sterling bloc. This means, Mr. Brin added, that the countervalue of the securities, after their sale by the State, will serve for the discharge of debts to British residents.

“It is apparent from all this that the object which the application of Regulation 7 is destined to serve includes in its purview the acquisition of securities in foreign currency belonging to local residents, and the concern of the latter in the said object 1—which is consonant with that underlying section 1 (2) (b) of the 1939 Law—admits of no doubt. Let us conclude this part by quoting the remarks made by Lord Justice Denning in *Boissevain v. Weil*, [1949] 1 All E.R. 146, 152, on some of the corresponding English regulations:

‘The regulations here in question were made during the war for the protection of our purchasing power. All the foreign assets of the people resident in this country were mobilized to form a pool which was used for purchases abroad.’

We emphasize the words: '*foreign assets of the people resident in this country*'.

"When heretofore we discussed, and drew our conclusions on, the scope of the power granted under the two Mandatory provisions, we did so only in the light of the object reflected therein. In the following we shall give our attention to the additional question whether the application of the said power to securities situated abroad would be effective. But another problem is preliminary to that question, namely: is it really correct to regard the securities which are the subject-matter of the said Orders as property situated abroad?"

The Court on this point reached the conclusion that the *situs* of the registered shares was in England, as was also the *situs* of the bearer shares. The Court then continued:

"The last—and most difficult—problem is: can the power conferred by the said two Mandatory provisions be effectively exercised in respect of securities having a foreign *situs*?"

"Since we have found that these provisions, in view of their object, do not apply to securities as aforesaid belonging to foreign residents, that problem is of no importance as regards the petitioners X and Y. On the other hand, it is of decisive importance as regards the other petitioners, since they, as stated, are local residents.

"As pointed out above, the local legislator is presumed to be dealing with persons and property over whom or which he has *effective* authority, and this rule is bound up with the principle of territorial sovereignty, which forms part of our private international law. We have already explained that *public* international law does not, in itself, hold that the laws or judgments of a State have no extraterritorial validity. On the other hand, Dicey's famous *dictum* that the authority of any State, in the eyes of other States and the Courts that represent them, is a territorial authority, and that it, the foreign State, has no authority to legislate for, and give judgments affecting, things or persons not within its territory—this *dictum*, as we have seen, embodies a rule which applies only from the point of view of the Courts in England. That is to say: it is a rule rooted in the private international law embodied in the Common Law, and it thus forms part also of the private international law of the State of Israel. In making a decision as to the extraterritorial validity of the two Mandatory provisions from the point of view of the question of effectiveness and enforceability, we have to bear in mind that this rule cannot have escaped the notice of the Israel legislator. That is to say: our legislator must be presumed to have taken over the two above-mentioned provisions into Israel law whilst assuming that the Courts in other States would not give greater effect

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to his laws than the Courts here would, according to the same rule, give to the laws of other States. The question which we have to resolve thus reduces itself to this: did the Israeli legislator—notwithstanding that assumption—in fact intend that the power conferred by Regulation 7 (2) should be exercisable in respect of securities having a foreign *situs* and belonging to local residents?

“We think there is no point in examining the question of effectiveness and enforceability in the light of the rules of private international law applying in the country considered to be the *situs* of the securities in question. It is obvious that the rules of private international law are not uniform, but vary from State to State. The Courts in England, for instance, have always refused to recognize a law enacted in another State—even when it purported to have extritorial validity—if such law was of a confiscatory character and the property which was the subject-matter thereof was, at the time of its enactment, outside the area of jurisdiction of the legislating State. See *Lecouturier v. Rey*, [1910] A.C. 262; *The Jupiter* (No. 3), *Annual Digest*, 1925–1926, Case No. 100; *Sedgwick Collins & Co. v. Russia Ins. Co. of Petrograd*, [1926] 1 K.B. 1; [1927] A.C. 95; *Re Russian Bank for Foreign Trade*, *Annual Digest*, 1933–1934, Case No. 55; *Manufacturing Company I.A. Wormina v. Huth*, *ibid.*, 1927–1928, Case No. 91.

“On the other hand, the Supreme Court of the United States recognized the applicability of a Russian nationalization law to a monetary deposit which a Russian Company had with a New York Bank—that is to say, to a chose in action having an American *situs*—and which had been transferred to the Government of the United States in virtue of an agreement between it and the Soviet Government; the said Court did so notwithstanding the purely confiscatory character of the said measure (*United States v. Belmont* [*Annual Digest*, 1935–1937, Case No. 15]).

“There are also differences in the approach of the Courts of different countries regarding the extritorial applicability of foreign laws which are not of a confiscatory character, such as laws permitting the temporary requisition of a citizen's property (requisition decree) or its expropriation against payment of full compensation (expropriation laws) (see the differentiation between these two kinds of laws in Martin Wolff, *Private International Law*, 2nd ed., pp. 525, 527, and in an article by Fawcett in *British Year Book of International Law*, Vol. 27 (1950), p. 355). On the other hand, the Court in Scotland refused to assign to a requisition decree enacted by the Spanish Republican Government extritorial validity in respect of a ship registered in Bilbao and owned by a company

likewise registered in that city, because the said Government had lost control of Bilbao before enacting the said decree (*The El Condado, Annual Digest*, 1938-1940, Case No. 77). The Scottish Court adopted this approach although that decree was by no means of a confiscatory character (this latter fact is stressed in a Note in *British Year Book of International Law*, Vol. 21 (1944), p. 188). On the other hand, in *Anderson v. N.V. Transandine, Annual Digest*, 1941-1942, Case No. 4, the question was discussed of the extritorial applicability of a royal decree issued by the Dutch Government during the Second World War. That Decree transferred to the Dutch State the ownership of property belonging to persons who were at the time domiciled in German occupied Dutch territory—the idea being merely that the said State should act as trustee for the private owners, in order to prevent the property being used to the detriment of the interests of Holland. We thus again have to do with legislation devoid of confiscatory significance, and the New York Court of Appeal decided to recognize, by virtue of that legislation, the ownership of the Dutch State in certain intangible rights—such as monetary deposits and securities—which had been assigned a New York *situs* and which had originally belonged to a Dutch company and Dutch residents (part of the judgment of the Judge who had sat in the first instance—the late Shientag J.—was quoted by Mr. Justice Atkinson in *Lorentzen v. Lydden & Co., Annual Digest*, 1941-1942, Case No. 34, and that part gives the substance of the said Dutch Decree).

“In England itself, the judgments—they were all given by Judges sitting in the first instance—reflect a sharp difference of opinion concerning the extritorial applicability of foreign laws of the category of requisition decrees and expropriation laws to property which, at the time of the enactment of those laws, was owned by nationals or residents of the legislating State, while the *situs* assigned to it was, at that time, outside the latter's territory. See the respective judgments in the above-mentioned cases of *Lorentzen* and *Bank Voor Handel*. While one school of thought affirms the extritorial enforceability of laws of the said category, the other denies it utterly. In the last-mentioned case, Mr. Justice Devlin based himself, *inter alia*, on the wide language employed by Lords MacNaghten and Loreburn in *Lecouturier v. Rey*, but agreed that that language might have to be more narrowly interpreted in view of the character of the measure which formed the subject of the debate in the House of Lords and which was of a strikingly confiscatory character. It follows that the above problem has not yet found its final solution in the House of Lords, and the same applies to the position of the English Court of Appeal.

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In the *Bank Voor Handel* case, the Dutch legislation referred to in *Anderson v. Transandine* was discussed, and it is clear that Mr. Justice Devlin arrived at a conclusion opposite to that adopted by the Court of Appeal of New York. Further, in the case of *The Rigmor*, *Annual Digest*, 1941-1942, Case No. 63, the Supreme Court of Sweden, considering the question of the extritorial validity of the Norwegian requisition decree dealt with in the *Lorentzen* case, adopted a different attitude from that of Mr. Justice Atkinson.

"It would obviously be utterly unpractical to conclude that the local legislator was concerned with the rules of private international law obtaining in the country considered as the *situs* of the security, and to say that if those rules permit the enforcement of the Orders issued by the respondent, those Orders are applicable to the securities 'situated' in that country, and if not, they are not so applicable. Such an approach would be confusing and irrational; it would lead to haphazardness by making the solution in respect of each security affected by the Orders dependent on rules which, as already mentioned, vary from State to State. This is why we said that in so far as the Israeli legislator had taken into account private international law, he was concerned only with the local rules, which are based on the principle of territorial sovereignty—a rational and uniform principle. Accordingly, the test of effectiveness may indeed militate against assigning extritorial validity to the said Mandatory provisions, since the legislator is presumed not to have expected other States to give greater effect to his laws than he would, according to the same rule, give to theirs. Thus again, the sole question is: must we, notwithstanding the said test—the test of effectiveness and enforceability—attribute to the legislator the intention that the Orders made under Regulation 7 shall apply to 'foreign' securities belonging to local residents? We answer this question in the affirmative. The reasons on which our answer is based are the following:

"A. As hinted above, the test of effectiveness is not a rigid or decisive test in a matter of the kind here under consideration, but serves, at the most, as an important means of ascertaining the legislator's intention regarding the scope of the Law, that is to say, whether it is to be considered valid also beyond the borders of the State. If the Law itself contains an express provision in the direction of extritorial validity, the question of effectiveness and enforceability will not arise at all before the local Court. The same applies if the clauses of the Law, as read together, show clearly that this question had not escaped the notice of the legislator, and that he even troubled to provide means for ensuring that the purpose for

which the Law had been enacted was achieved also outside the area of the State. As will be demonstrated below, the said Regulation 7 contains several provisions clearly designed to ensure that a Transfer Order made under Sub-regulation 2 would be effective also in respect of securities such as those dealt with in this part of our judgment.

" B. The principle of territorial sovereignty, with which the test of effectiveness is closely bound up, requires additional clarification at this point. Its gist is, as will be remembered, that every State has authority over persons and property situated within its area, but not (except for a few cases) over persons and property outside the same. In our opinion, the emphasis should be laid on the positive aspect of that principle. A State has power to create (and abrogate) rights in property situated within its territorial domain, notwithstanding that the owners are living or domiciled abroad. For instance under Regulation 48 of the Defence Regulations the competent authority was granted power to requisition land for any purpose within the scope of the general objects set out in section 1 of the 1939 Law. No one will doubt that that competent authority had power to requisition—so long as the requisition was in force—a local building belonging at the time to a foreign resident. The same applies to the power of the Minister of Finance to expropriate immovable property for a purpose approved by him as a public purpose (section 3 of the Land (Acquisition for Public Purposes) Ordinance, 1943). That is to say, no one will challenge a particular act of expropriation of the Minister of Finance with regard to land which has local *situs*, but whose owners are living outside Israel. It is clear that each of these two acts directly affects not only the property in question itself, but also the persons to whom the rights—rights of possession and ownership—relating to the affected property belong—notwithstanding the fact that these persons were not at the time within the territory in which the requisitioning or expropriating authority acted. As Professor Cook says (*op. cit.*, p. 60),

'It is impossible to create rights which affect or bind a thing without at the same time also creating rights which affect or bind the person who has rights relating to the thing. It follows that when this person is in one State and the thing is in another, it is a logical impossibility to assign exclusive jurisdiction over the person to one State and exclusive jurisdiction over the thing to another.'

" It will not be difficult for us to go one step further, and to conclude that the State has power to effect a change in rights belonging to persons who are its permanent residents, even if these rights relate to property situated outside its

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territorial borders. For instance, Reuben and Simeon, local residents, enter here into an agreement by which the former undertakes to sell to the latter his house situated in England. If Reuben violates the agreement and Simeon sues him in Israel for specific performance, it is to be assumed that the local Court will decide, in accordance with the local or the English rule, that Simeon, by virtue of the agreement, has acquired an equitable right to the ownership of the said house, a right which on the part of Reuben entails the obligation to effect the transfer. Also, the local Court not only will not hesitate to order specific performance, but will have power to force Reuben to comply with an order as aforesaid by applying to him the sanction for 'contempt of court'. In England, the law was laid down in this sense a number of times; we would call attention to Lord Cottenham's remarks in *Ex parte Pollard* (1740), quoted approvingly by Lord Finlay in *Brown v. Gregson*, [1920] A.C. 860, 875; Arden M.R.'s remarks in *Cranston v. Johnston* (30 E.R. 952), and Lord Justice Kennedy's remarks in *British So. Africa Co. v. de Beers Ltd.*, [1910] 2 Ch. Div. 502, 524 . . .

"What is the difference between the two classes of cases exemplified above? The difference is this: in one class, the State creates (and abrogates) legal rights which are effective against 'the whole world', and can do so by virtue of the direct control which it wields over the *property* situated within the area in which it exercises its sovereignty; in the other class, the State merely determines equitable rights, and can only *indirectly*—thanks to the control it wields over the *owners* who are within the area of its jurisdiction—determine legal rights. This difference is clearly brought out in the judgment of Justice McKenna in the American case of *Fall v. Eastin* (30 S.Ct. Rep. 38).

"In the same case, it was pointed out by Justice Holmes that when the Court in one State gives effect to an equitable right and orders the defendant to transfer to the plaintiff his property in another State, the meaning of the order, with regard to the parties themselves, is that a personal obligation is imposed on the defendant to effect the transfer; he further stressed that the making of a personal order bearing such meaning is within the power of the Court, since it has control over the defendant (*ibid.*, p. 9).

"This peculiar approach, which a Court applying the rules of equity will also use when concerned with giving effect to equitable rights as to property situated in another State, can throw light on the method which the local legislator provided in the said Regulation 7 when wishing to ensure that the Transfer Orders of the Minister of Finance would

have effective validity both here and abroad. This method plainly consists in imposing personal obligations on the local owners—obligations compliance with which is calculated to ensure the effective vesting of the rights in the securities in the respondent. It has the advantage of not being in contradiction with the principle of territorial sovereignty, as it mobilizes the power of the State only against persons within the area of its jurisdiction, without ‘directly affecting’—it is only to this that Story objects in his third proposition—the foreign property itself. . . .

“C. It may be assumed—and it can hardly be doubted—that where a sovereign State performs an act of State, other than one of a confiscatory nature, in respect of property of a national or a resident who owes it allegiance, even though such property be situated within the area of another State, the Courts of the other State will not hesitate to recognize the validity of at least the relative rights acquired by the first State from the local owner, provided that friendly and normal relations exist between the two States. In the *Lorentzen* case—which was concerned with a requisition decree enacted by the Norwegian Government in 1940 and empowering the Minister of Shipping to requisition the rights in ships registered in German-occupied Norwegian territory and belonging to persons domiciled in that territory—Mr. Justice Atkinson said:

‘There are only two comments which I desire to make upon the quotation from Dicey. [The reference is to the version contained in the fifth edition.] The first is to underline the words “speaking very generally”, and secondly to underline the exception “unless they are its subjects”. It is plain that the (requisition) order in this case does not affect in any way the rights of anyone in this country [England]. It regulates the rights of the owner of the debt in Oslo and that owner’s government.’ (*Annual Digest*, 1941–1942, at p. 134.)

“Indeed, Mr. Justice Atkinson eventually went so far as to recognize the extraterritorial validity of the real rights acquired by the Norwegian Minister of Shipping in respect of the ship in question, just as Chief Justice Lehman recognized the extraterritorial validity of the real ownership acquired by the Dutch State—under the said Dutch law—in rights which had been assigned a New York *situs* and which were the subject matter of the above-mentioned case of *Anderson v. Transandine*. An extract from Chief Justice Lehman’s words is quoted in *British Year Book of International Law*, Vol. 27 (1950) p. 367, and emphasis should be laid on the following passage: ‘. . . the decree of May 24, 1940, promulgated by the recognized Government of the State of the Netherlands is part of the law of a friendly sovereign State of which the defendants are

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subjects and in which the defendants are domiciled.' True, in the *Bank Voor Handel* case, Mr. Justice Devlin refused to recognize the extritorial applicability of the same Dutch Law, since he considered that the right of the Custodian of Enemy Property in England to the gold in question, which was at the time deposited in London and had originally belonged to the plaintiff, a Dutch company, prevailed—in virtue of the *lex situs* (Trading with the Enemy Act)—over the ownership which had allegedly passed to the Dutch State and which the latter had subsequently purported to re-transfer to the plaintiff. But it should be noted that Mr. Justice Devlin was concerned only with the question to whom the real right in the gold belonged, and we cannot discover the slightest contradiction between his decision and the rule reflected in the above quoted remarks of Mr. Justice Atkinson, recognizing the validity out of the jurisdiction of the relative rights acquired by a sovereign State which had performed an act of State of the kind mentioned in respect of foreign property of its nationals or permanent residents.

"Let us now apply this rule, which should be regarded as part of our private international law, to the matter before us. The petitioners have not indicated in their petition that they, or any one of them, have or has a foreign nationality. As stated, every one of them is resident in Israel, and there is not before us any plea or proof by them, suggesting that their domicile is in another State. Under these circumstances, and to the extent that the above rule can serve as a test of effectiveness, we shall not go wrong in concluding that the Courts of those States with which the State of Israel maintains friendly and normal relations will not refuse to recognize at least the *relative* rights acquired by the Minister of Finance in the securities in question.

"This conclusion does not itself constitute a complete answer to the question of enforceability, for the legislator, when making the two Mandatory provisions—and especially Regulation 7—aimed at obtaining not merely the relative rights, which apply only *vis-à-vis* the owners of the securities, but also the real ownership, so that he might be able to sell the securities abroad, receive foreign currency for them and thereby increase the purchasing power of the State in other countries. Nevertheless, even the extritorial recognition of the relative rights has a certain value and may play a part in increasing the effectiveness of the Transfer Orders. This also will be gone into below.

"D. In order to be able to solve correctly the problem of effectiveness and enforceability, we shall do well to resort to the same test as served us when dealing with the question

of the *situs* to be assigned to the said securities. Here, too, we find ourselves in a certain tangle, since we are concerned with the acquisition of absolute real rights not to tangible property, but to intangible rights, and the question is, therefore, how the legislator provided—and it is now clear that he did in fact provide—for ensuring that the transfer of the rights represented by the shares and debentures would be effective *vis-à-vis the companies* which had issued them. For the sake of clarity, we shall again concentrate upon the securities of the category of shares.

“ We shall not be able to resolve that tangle without paying regard to another distinction, not previously mentioned by us, between categories of rights. It is the distinction between the *jus ad rem*, which belongs to a person who has not yet acquired the full ownership of the shares, because this requires, under the law applicable to the company or its rules, a further act—for instance, his registration as the owner in the register of the company—and the *jus in re*, which belongs to a person recognized also by *the company* as the owner of the shares. This distinction is important, since a person may sometimes acquire all the rights in certain shares—both absolute real rights and relative obligatory rights (and we may add: both legal and equitable rights)—and still not be regarded, *by the company*, as the owner of the shares so long as the law applicable to the company or its rules required a further act, such as registration of the transfer in the register. Such a contingency is not remote, for instance, in cases where the rules of the company permit the transfer of the shares in the form occasionally used in the United States and in Canada and commonly referred to as ‘ the American form ’. Under this method, the shares pass by way of delivery from hand to hand of the certificate relating to them, after the transferor has endorsed it in blank. A transfer in the manner aforesaid does not in itself—so that method has it—confer on the last holder of the certificate the status of owner *in the eyes of the company*, as this requires that he fill his name above the blank endorsement and produce the certificate to the company, and that the latter register his name in the register of shareholders kept at its registered office. In the above-quoted case of *Colonial Bank v. Cady*, Lord Watson, explaining the significance of a transfer in the American form, made the following remarks, 15 A.C. 267 at p. 277:

‘ The right of the holder appears from these explanations to be in the nature of a *jus ad rem* and not of a *jus in re*. Delivery does not vest him with the ownership of the shares in the sense that no further act is required in order to perfect his right. Notwithstanding his having parted with the certificate and

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transfer, the original transferor, who is entered as owner in the certificate and register, continues to be the only shareholder recognized by the Company as entitled to vote and draw dividends in respect of the shares until the transferee or holder for the time being obtains registration in his own name. It would therefore be more accurate to say that such delivery passes, not the property of the shares, but a title legal and equitable, which will enable the holder to vest himself with the shares without risk of this right being defeated by another person deriving title from the registered owner.'

"We do not doubt that when dealing with the problem of effectiveness and enforceability, *i.e.*, of devising machinery to ensure that the transfer of the shares was effective also *vis-à-vis* the local and foreign companies which issued them, the legislator suited his method also to the principle governing transfers of the above-mentioned kind, and especially took into account the distinction between *jus ad rem* and *jus in re*. (Instructive in this connection is a remark in Butterworth's *Emergency Legislation*, Suppl. No. 14, in an analysis of the English Regulation corresponding to our regulation 7, namely: 'in most cases . . . securities will be in the American form' (p. 23).)

"On the other hand, the legislator empowered the respondent to make orders capable of vesting him with the real rights in the shares specified in them—in the sense of *jus ad rem*—and on the other, he strove to ensure that the transfers were perfected in such manner that the respondent was recognized as the owner of the said shares also by the companies which had issued them, *i.e.*, that he became also the holder of the *jus in re*. To achieve the latter object, the legislator imposed—and also empowered the respondent to impose—certain personal obligations on the local owners of the shares. He devised this special machinery, firstly, in order not radically to upset the whole method governing the transfer of shares and followed by every company; secondly, because the approach adopted by him did not conflict with the principle of territorial sovereignty; and thirdly, in order to dispel any apprehension that might arise lest the Courts abroad recognize only the relative rights acquired by the respondent by the Transfer Orders issued under regulation 7 (2). This last motive was perhaps the most important, since the very existence of such an apprehension might tend to diminish the value of the shares and thus to defeat the purpose of trading in them and obtaining foreign currency for the State in adequate amounts. . . ."

At this point the Judge analysed the machinery by which the securities were acquired and summarized it as follows:

“ a. The legislator provided for the implementation of a Transfer Order—meaning transfer of the full ownership, in the sense of the *jus in re*, to the respondent—not by way of the performance of an act directly affecting the securities which are the subject of the Order, but in an indirect way, namely, by means of the obligations mentioned in sub-regulations (3) and (5).

“ b. These obligations are enforced directly against the persons of the local owners of the shares, in virtue of the sovereign authority which the State exercises over those who are within its territorial domain.

“ c. In devising the above method, the legislator thus remained faithful to the principle of territorial sovereignty, and the basic uniformity of the modes of implementation adopted against local owners of local and foreign securities likewise testifies to his strict adherence to the said principle.

“ d. The imposition of the said obligations for the purpose of completing the transfer of the ownership of securities to which a foreign *situs* is assigned is like the imposition of the obligation which a Court applying the rules of equity places upon the person of the defendant when ordering him to transfer to the plaintiff immovable property situated in another State. It should be noted that a person contravening the provisions of sub-regulation (3)—that is to say, failing to discharge the obligations imposed on him under that sub-regulation—is liable to punishment. It may be assumed, however, that the respondent will not find it difficult to secure specific performance of those obligations by recourse to the civil Court.

“ It follows from all this that the legislator concerned himself in advance with the question of the enforceability of Transfer Orders under regulation 7 (2) and devised elaborate machinery capable of disposing of any obstacle that might arise in that sphere. Once this conclusion has been reached, the question of effectiveness has been finally solved, unless someone should say that nevertheless—even if the respondent has acquired title to securities issued by foreign companies, and even if he had secured his registration as the owner of the registered shares in the registers of the said companies—the apprehension cannot be ruled out that others may come and challenge his ownership of the different kinds of securities in the Courts of the foreign States. In our opinion, even if there were any basis for that apprehension, we should not regard this as a serious argument, calculated to invalidate the answer which we have given to the above question. However, in our opinion there is no basis for it. It is to this point that we shall devote our concluding remarks.

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" e. In declaring that there is no basis for the said apprehension, we rely on a combination of two principles, one stemming from private and the other from public international law. The first principle has already been discussed above; it served us as a test for our assumption that the Courts in the foreign State which is regarded as the *situs* of the securities in question will not hesitate to recognize at least the relative rights acquired by the respondent, in virtue of the Transfer Orders, in the said securities. The second principle concerns the immunity which every State, in virtue of its sovereignty, enjoys in certain matters and which other States and their Courts must respect. Taking together these two factors—the assumption of the recognition by the foreign Courts of the said relative rights, and the necessity of respecting the immunity enjoyed by the State of Israel in other friendly States—there will be no reason to apprehend, after the respondent has been registered as the owner of the securities in the registers of the foreign companies and obtained control of the bearer securities, that the foreign Courts will disallow, or hinder, him from enjoying his rights in those securities. In this regard we rely on Lord Wright's judgment in *The Cristina* (*supra*)

...
" It follows that the contention that the said Transfer Orders, by reason of the above-mentioned apprehension, are ineffective in respect of securities having a foreign *situs* is without foundation, and this disposes of the contention relating to enforceability.

" *In fine*, the Transfer and Surrender Orders issued by the respondent and which have been the subject-matter of the proceedings before us are valid in so far as they relate to foreign securities belonging to local residents, and are not valid in so far as they relate to foreign securities belonging to foreign residents."

[Reports: *Piskei-Din*, Vol. 6 (1952), p. 945; *Pesakim Elyonim*, Vol. 5 (1951-2), p. 483.]

NOTE.—In *Rom v. Minister of Defence*, decided on May 27, 1954, the same Court, specially composed of five Judges, refused to reconsider the question of the effect of Transfer and Surrender Orders in respect of foreign securities deposited in Israel and belonging to foreign residents. The Court's decision was based on the doctrine of *stare decisis*. [Reports: *Piskei-Din*, Vol. 8 (1954), p. 49; *Pesakim Elyonim*, Vol. 15 (1954), p. 303.]

B—EXTRATERRITORIAL JURISDICTION

CONSULAR JURISDICTION. RÉGIME OF CAPITULATIONS

Jurisdiction—Extra-territorial Consular Jurisdiction—Capitulatory Régime—Equality of Treatment—Capitulatory Régime in Protected States—Equality of Treatment in Relation to Protecting States—Status of Protectorate as a Subject of International Law—Most-favoured-nation Clause—Operation in Relation to Capitulatory Régime—Acquisition of Capitulatory Rights by Custom—Requirements of Custom as a Source of International Law—Right of Assent to Legislation in Capitulatory Régime—Capitulatory Régime and Immunity from Taxation—Equality of Treatment and Method of Assessment of Customs Duties.

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CASE CONCERNING RIGHTS OF NATIONALS OF THE UNITED STATES OF AMERICA IN MOROCCO.

(*France v. United States.*)

International Court of Justice.

(Sir Arnold McNair, President; Basdevant, Hackworth, Zoričić, Klaestad, Badawi, Read, Hsu Mo, Levi Carneiro, Sir Benegal Rau, Armand-Ugon, Judges.)

Judgment of August 27, 1952.

THE FACTS (as stated by the Court).—On October 28, 1950, the Chargé d'affaires *a.i.* of France to the Netherlands filed in the Registry, on behalf of the Government of the French Republic, an Application instituting proceedings before the Court against the United States of America, concerning the rights of nationals of the United States of America in Morocco. The application referred to the Declarations by which the Government of the United States of America and the French Government accepted the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Court's Statute. It also referred to the Economic Co-operation Agreement of June 28, 1948, between the United States and France, and to the Treaty for the Organization of the French Protectorate in the Shereefian Empire, signed at Fez on March 30, 1912, between France and the Shereefian Empire. It mentioned the Treaty of Peace and Friendship of September 16, 1836, between the United States and the Shereefian Empire, as well as the General Act of the International Conference of Algeciras of April 7, 1906.

"The Court will first deal with the dispute relating to the Decree issued by the Resident General of the French Republic in Morocco, dated December 30, 1948, concerning the regulation

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of imports into the French Zone of Morocco. The following Submissions are presented:

“ On behalf of the Government of France:

“ That the Decree of December 30, 1948, concerning the regulation of imports not involving an allocation of currency is in conformity with the economic system which is applicable to Morocco, according to the conventions which bind France and the United States.”

“ On behalf of the Government of the United States of America:

“ The treaty rights of the United States in Morocco forbid Morocco to impose prohibitions on American imports, save those specified by the treaties, and these rights are still in full force and effect.

“ The Dahir of December 30, 1948, imposing a prohibition on imports is in direct contravention of the treaty rights of the United States forbidding prohibitions on American imports. . . .”

“ The French Government contends that the Decree of December 30, 1948 [issued by Morocco, a French Protectorate, concerning the regulation of imports not involving an allocation of currency], is in conformity with the treaty provisions which are applicable to Morocco and binding on France and the United States. This contention is disputed by the United States Government for various reasons. The Court will first consider the claim that the Decree involves a discrimination in favour of France which contravenes the treaty rights of the United States.

“ By a Dahir of September 9, 1939, His Shereefian Majesty decided as follows:

‘ *Article 1.*—It is prohibited to import into the French zone of the Shereefian Empire, whatever may be the customs regulations in force, goods other than gold in any form.

Article 2.—The director general of Communications may, however, waive this prohibition on entry as regards combustible solid mineral matter and petroleum products, and the director of Economic Affairs may do likewise as regards any other products.

Article 3.—It is left to the decision of the Resident General to determine the measures whereby the provisions herein contained shall be put into effect.”

“ A Residential Decree of the same date laid down the terms of application of the Dahir, including provisions relating to requests for a waiver of the prohibition of imports. Article 4 provided:

‘ Goods of French or Algerian origin shipped from France or Algeria, shall for the time being be admitted without any special formalities.’

" Further regulations were prescribed by a Residential Decree of September 10, 1939, subjecting imports without official allocation of currency to special authorization. Article 7 provided in its first paragraph:

' Commercial arrangements with France, Algeria, French Colonies, African territories under French Mandate, and Tunisia, are not subject to the provisions herein contained.'

" By a Residential Decree of March 11, 1948, a new Article 5 was added to the Decree of September 9, 1939:

' *Article 5.*—Save for such exceptions as may be specified by the appropriate heads of departments, the prohibition on entry shall hereafter be generally waived as regards goods imported from any origin or source, when import does not entail any financial settlement between the French zone of the Shereefian Empire, France, or any territory of the French Union on the one part and foreign territory on the other part.'

" Finally, this new Article 5 was revoked by the Decree of December 30, 1948, which is the subject-matter of the present dispute. After having referred to the Dahir of September 9, 1939, and to the Decrees of that date and of March 11, 1948, the Resident General of the French Republic decreed:

' *Article 1.*—The provisions of Article 5 of the aforesaid Residential Decree of September 9, 1939, will cease to apply as from January 1, 1949, save for the exception set out in Article 2 hereof.

Article 2.—Goods which are proved to have been shipped directly to the French Zone of the Shereefian Empire before January 15, 1949, shall still fall within the provisions of Article 5 of the aforesaid Residential Decree of September 9, 1939.

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" The effect of this Decree was to restore the import regulations introduced in September 1939. Imports without official allocation of currency were again subjected to a system of licensing control. But these import regulations did not apply to France or other parts of the French Union. From France and other parts of the French Union imports into the French Zone of Morocco were free. The Decree of December 30, 1948, involved consequently a discrimination in favour of France, and the Government of the United States contend that this discrimination contravenes its treaty rights."

The other relevant facts and contentions of the Parties appear from the *Held*, below.

Held (on the Submissions of the Government of the French Republic):

" unanimously,

" Rejects its Submissions relating to the Decree of December

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30, 1948, issued by the Resident General of the French Republic in Morocco;

“unanimously,

“Finds that the United States of America is entitled, by virtue of the provisions of its Treaty with Morocco of September 16, 1836, to exercise in the French Zone of Morocco consular jurisdiction in all disputes, civil or criminal, between citizens or protégés of the United States;

“by ten votes to one,

“Finds that the United States of America is also entitled, by virtue of the General Act of Algeciras of April 7, 1906, to exercise in the French Zone of Morocco consular jurisdiction in all cases, civil or criminal, brought against citizens or protégés of the United States, to the extent required by the provisions of the Act relating to consular jurisdiction;

“by six votes to five,

“Rejects, except as aforesaid, the Submissions of the United States of America concerning consular jurisdiction;

“unanimously,

“Finds that the United States of America is not entitled to claim that the application to citizens of the United States of all laws and regulations in the French Zone of Morocco requires the assent of the Government of the United States, but that the consular courts of the United States may refuse to apply to United States citizens laws or regulations which have not been assented to by the Government of the United States;

“on the counter-claim of the Government of the United States of America,

“by six votes to five,

“Rejects the Submissions of the United States of America relating to exemption from taxes;

“by seven votes to four,

“Rejects the Submissions of the United States of America relating to the consumption taxes imposed by the Shereefian Dahir of February 28, 1948;

“by six votes to five,

“Finds that, in applying Article 95 of the General Act of Algeciras, the value of merchandise in the country of origin and its value in the local Moroccan market are both elements in the appraisal of its cash wholesale value delivered at the custom-house.”

The Court said:

[I. *The Protecting State, The Protected State and Equality of Treatment.*].—“It is common ground between the Parties that the characteristic of the status of Morocco, as resulting from the General Act of Algeciras of April 7, 1906, is respect for the

three principles stated in the Preamble of the Act, namely: 'the sovereignty and independence of His Majesty the Sultan, the integrity of his domains, and economic liberty without any inequality'. The last-mentioned principle of economic liberty without any inequality must, in its application to Morocco, be considered against the background of the treaty provisions relating to trade and equality of treatment in economic matters existing at that time.

"By the Treaty of Commerce with Great Britain of December 9, 1856, as well as by Treaties with Spain of November 20, 1861, and with Germany of June 1, 1890, the Sultan of Morocco guaranteed certain rights in matters of trade, including imports into Morocco. These States, together with a number of other States, including the United States, were guaranteed equality of treatment by virtue of most-favoured-nation clauses in their treaties with Morocco. On the eve of the Algeiras Conference the three principles mentioned above, including the principle of 'economic liberty without any inequality', were expressly accepted by France and Germany in an exchange of letters of July 8, 1905, concerning their attitude with regard to Morocco. This principle, in its application to Morocco, was thus already well established, when it was re-affirmed by that Conference and inserted in the Preamble of the Act of 1906. Considered in the light of these circumstances, it seems clear that the principle was intended to be of a binding character and not merely an empty phrase. This was confirmed by Article 105, where the principle was expressly applied in relation to the public services in Morocco. It was also confirmed by declarations made at the Conference by the representative of Spain, who referred to 'equality of treatment in commercial matters', as well as by the representative of France.

"The establishment of the French Protectorate over Morocco by the Treaty of March 30, 1912, between France and Morocco, did not involve any modification in this respect. In the Convention between France and Germany of November 4, 1911, concerning the establishment of this Protectorate, the Government of Germany made in Article 1 the reservation that 'the action of France should secure in Morocco economic equality between the nations'. On the other hand, the Government of France declared in Article 4 that it would use its good offices with the Moroccan Government 'in order to prevent any differential treatment of the subjects of the various Powers.'

"The other States on behalf of which the Act of Algeiras was signed, with the exception of the United States, adhered later to the Franco-German Convention of 1911, thereby

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again accepting the principle of equality of treatment in economic matters in Morocco. France endeavoured to obtain also the adherence of the United States, and in a Note of November 3, 1911, from the French Ambassador in Washington to the United States Secretary of State, reference was made to the Franco-German Convention. It was declared that France would use her good offices with the Moroccan Government in order to prevent any differential treatment of the subjects of the Powers. In another Note from the French Ambassador to the Secretary of State, dated November 14, 1918, it was declared that the benefit of commercial equality in Morocco results, not only from the most-favoured-nation clause, but also from the clause of economic equality which is inserted in the Act of Algeciras and reproduced in the Franco-German Convention of 1911.

"These various facts show that commercial or economic equality in Morocco was assured to the United States, not only by Morocco, but also by France as the protecting State. It may be asked whether France, in spite of her position as the protector of Morocco, is herself subject to this principle of equality and can not enjoy commercial or economic privileges which are not equally enjoyed by the United States.

"It is not disputed by the French Government that Morocco, even under the Protectorate, has retained its personality as a State in international law. The rights of France in Morocco are defined by the Protectorate Treaty of 1912. In economic matters France is accorded no privileged position in Morocco. Such a privileged position would not be compatible with the principle of economic liberty without any inequality, on which the Act of Algeciras is based. This was confirmed by the above-mentioned Note from the French Ambassador in Washington of November 14, 1918, where it is stated that, by virtue of the clause of economic equality inserted in the Act of Algeciras, other States have preserved their right to enjoy such equality, '*même vis-à-vis de la Puissance protectrice*', and that the United States can, therefore, not only recognize French courts in Morocco, but also give up, in the French Zone, the enjoyment of all privileges following from capitulations, without thereby losing this advantage.

"It follows from the above-mentioned considerations that the provisions of the Decree of December 30, 1948, contravene the rights which the United States has acquired under the Act of Algeciras, because they discriminate between imports from France and other parts of the French Union, on the one hand, and imports from the United States on the other. France was exempted from control of imports without allocation of currency, while the United States was subjected to such control.

This differential treatment was not compatible with the Act of Algeciras, by virtue of which the United States can claim to be treated as favourably as France, as far as economic matters in Morocco are concerned.

“ This conclusion can also be derived from the Treaty between the United States and Morocco of September 16, 1836, Article 24, where it is ‘ declared that whatever indulgence, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be equally entitled to them ’. Having regard to the conclusion already arrived at on the basis of the Act of Algeciras, the Court will limit itself to stating as its opinion that the United States, by virtue of this most-favoured-nation clause, has the right to object to any discrimination in favour of France, in the matter of imports into the French Zone of Morocco.

“ The Government of France has submitted various contentions purporting to demonstrate the legality of exchange control. The Court does not consider it necessary to pronounce upon these contentions. Even assuming the legality of exchange control, the fact nevertheless remains that the measures applied by virtue of the Decree of December 30, 1948, have involved a discrimination in favour of imports from France and other parts of the French Union. This discrimination can not be justified by considerations relating to exchange control.

“ For these reasons the Court has arrived at the conclusion that the French Submission relating to the Decree of December 30, 1948, must be rejected. It therefore becomes unnecessary to consider whether this Submission might be rejected also for other reasons invoked by the Government of the United States. In these circumstances, the Court is not called upon to consider and decide the general question of the extent of the control over importation that may be exercised by the Moroccan authorities.”

[II. *Consular Jurisdiction and Most-Favoured-Nation Clause.*]
—“ The Court will now consider the extent of the consular jurisdiction of the United States of America in the French Zone of Morocco.

“ The French Submission in this regard reads as follows:

‘ That the privileges of the nationals of the United States of America in Morocco are only those which result from the text of Articles 20 and 21 of the Treaty of September 16, 1836, and that since the most-favoured-nation clause contained in Article 24 of the said Treaty can no longer be invoked by the United States in the present state of the international obligations of the Shereefian Empire, there is nothing to justify the granting to the nationals

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of the United States of preferential treatment which would be contrary to the provisions of the treaties.'

"The United States Submission concerning consular jurisdiction reads as follows:

'3. The jurisdiction conferred upon the United States by the Treaties of 1787 and 1836 was jurisdiction, civil and criminal, in all cases arising between American citizens.

'In addition, the United States acquired in Morocco jurisdiction in all cases in which an American citizen or protégé was defendant through the effect of the most-favoured-nation clause and through custom and usage.

'Such jurisdiction was not affected by the surrender by Great Britain in 1937 of its rights of jurisdiction in the French Zone of Morocco.

'Such jurisdiction has never been renounced, expressly or impliedly, by the United States.'

"It is common ground between the Parties that the present dispute is limited to the French Zone of Morocco. It is on this ground that it has been argued. The Court cannot, therefore, pronounce upon the legal situation in other parts of Morocco.

"In order to consider the extent of the rights of the United States relating to consular jurisdiction, it has been necessary to examine three groups of treaties.

"The first group includes the bilateral treaties of Morocco with France, the Netherlands, Great Britain, Denmark, Spain, the United States, Sardinia, Austria, Belgium and Germany, which cover the period from 1631 to 1892.

"These treaties, which were largely concerned with commerce, including the rights and privileges of foreign traders in Morocco, dealt with the question of consular jurisdiction in three different ways:

- (1) Certain of the treaties included specific and comprehensive grants of rights of consular jurisdiction to the Powers concerned, *e.g.*, the Treaties with Great Britain of 1856 and with Spain of 1799 and 1861.
- (2) Certain of the treaties made strictly limited grants of privileges with regard to consular jurisdiction, *e.g.*, the Treaties with the United States of 1787 and 1836.
- (3) There were other treaties, which did not define in specific terms the treaty rights granted by Morocco, but, instead, granted to the foreign nations through the device of most-favoured-nation clauses, the advantages and privileges already granted, or to be granted, to other nations.

“ There is a common element to be found in the most-favoured-nation clauses which have brought about and maintained a situation in which there could be no discrimination as between any of the Powers in Morocco, regardless of specific grants of treaty rights. When the most extensive privileges as regards consular jurisdiction were granted by Morocco to Great Britain in 1856 and to Spain in 1861, these enured automatically and immediately to the benefit of the other Powers by virtue of the operation of the most-favoured-nation clauses.

“ The second group consisted of multilateral treaties, the Madrid Convention of 1880 and the Act of Algeiras of 1906. The method of relying on individual action by interested Powers, equalized by the operation of the most-favoured-nation clauses, had led to abuse and it had become necessary not merely to ensure economic liberty without discrimination, but also to impose an element of restraint upon the Powers and to take steps to render possible the development of Morocco into a modern State. Accordingly, the rights of protection were restricted, and some of the limitations on the powers of the Sultan as regards foreigners, which had resulted from the provisions of the earlier bilateral treaties, were abated. The possibility of abuse in the exercise by Morocco of the powers thus extended, was taken care of by reserving an element of supervision and control in the Diplomatic Body at Tangier.

“ The third group of treaties concerned the establishment of the Protectorate. It included the agreements which preceded the assumption by France of a protectorate over Morocco, and the Treaty of Fez of 1912. Under this Treaty, Morocco remained a sovereign State but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco. France, in the exercise of this function, is bound not only by the provisions of the Treaty of Fez, but also by all treaty obligations to which Morocco had been subject before the Protectorate and which have not since been terminated or suspended by arrangement with the interested States.

“ The establishment of the Protectorate, and the organization of the tribunals of the Protectorate which guaranteed judicial equality to foreigners, brought about a situation essentially different from that which had led to the establishment of consular jurisdiction under the earlier treaties. Accordingly, France initiated negotiations designed to bring about the renunciation of the régime of capitulations by the Powers exercising consular jurisdiction in the French Zone. In the case of all the Powers except the United States, these negotiations

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led to a renunciation of capitulatory rights and privileges which, in the case of Great Britain, was embodied in the Convention of July 29, 1937. In the case of the United States, there have been negotiations throughout which the United States has reserved its treaty rights.

"The French Submission is based upon the Treaty between the United States and Morocco of September 16, 1836, and it is common ground between the Parties that the United States is entitled to exercise consular jurisdiction in the case of disputes arising between its citizens or protégés. There is therefore no doubt as to the existence of consular jurisdiction in this case. The only question to be decided is the extent of that jurisdiction in the year 1950, when the Application was filed.

* * * * *

"The first point raised by the Submissions relates to the scope of the jurisdictional clauses of the Treaty of 1836, which reads as follows:

Article 20.—If any of the citizens of the United States, or any persons under their protection, shall have any dispute with each other, the Consul shall decide between the parties; and whenever the Consul shall require any aid, or assistance from our Government, to enforce his decisions, it shall be immediately granted to him.

Article 21.—If a citizen of the United States should kill or wound a Moor, or, on the contrary, if a Moor shall kill or wound a citizen of the United States, the law of the Country shall take place, and equal justice shall be rendered, the Consul assisting at the trial; and if any delinquent shall make his escape, the Consul shall not be answerable for him in any manner whatever.'

"It is argued that Article 20 should be construed as giving consular jurisdiction over all disputes, civil and criminal, between United States citizens and protégés. France, on the other hand, contends that the word 'dispute' is limited to civil cases. It has been argued that this word in its ordinary and natural sense would be confined to civil disputes, and that crimes are offences against the State and not disputes between private individuals.

"The Treaty of 1836 replaced an earlier treaty between the United States and Morocco which was concluded in 1787. The two treaties were substantially identical in terms and Articles 20 and 21 are the same in both. Accordingly, in construing the provisions of Article 20—and, in particular, the expression 'shall have any dispute with each other'—it is necessary to take into account the meaning of the word 'dispute' at the times when the two treaties were concluded. For this purpose it is possible to look at the way in which the word 'dispute' or its French counterpart was used in the different treaties

concluded by Morocco: *e.g.*, with France in 1631 and 1682, with Great Britain in 1721, 1750, 1751, 1760 and 1801. It is clear that in these instances the word was used to cover both civil and criminal disputes.

"It is also necessary to take into account that, at the times of these two treaties, the clear-cut distinction between civil and criminal matters had not yet been developed in Morocco.

"Accordingly, it is necessary to construe the word 'dispute', as used in Article 20, as referring both to civil disputes and to criminal disputes, in so far as they relate to breaches of the criminal law committed by a United States citizen or protégé upon another United States citizen or protégé.

* * * * *

"The second point arises out of the United States Submission that consular jurisdiction was acquired 'in all cases in which an American citizen or protégé was defendant through the effect of the most-favoured-nation clause and through custom and usage' and that such jurisdiction was not affected by the surrender by Great Britain in 1937 of its rights of jurisdiction in the French Zone and has never been renounced expressly or impliedly by the United States.

"It is necessary to give special attention to the most-favoured-nation clauses of the United States Treaty of 1836. There were two grants of most-favoured-nation treatment.

"Article 14 provides:

'The commerce with the United States shall be on the same footing as is the commerce with Spain, or as that with the most favored nation for the time being; and their citizens shall be respected and esteemed, and have full liberty to pass and repass our country and sea-ports whenever they please, without interruption.'

"Article 24 deals with the contingencies of war, but it contains a final sentence:

'... and it is further declared, that whatever indulgence, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be equally entitled to them.'

"These articles entitle the United States to invoke the provisions of other treaties relating to the capitulatory régime.

"The most extensive privileges in the matter of consular jurisdiction granted by Morocco were those which were contained in the General Treaty with Great Britain of 1856 and in the Treaty of Commerce and Navigation with Spain of 1861. Under the provisions of Article IX of the British Treaty, there was a grant of consular jurisdiction in all cases, civil and criminal, when British nationals were defendants. Similarly, in Articles IX, X and XI of the Spanish Treaty of 1861, civil

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and criminal jurisdiction was established for cases in which Spanish nationals were defendants.

"Accordingly, the United States acquired by virtue of the most-favoured-nation clauses, civil and criminal consular jurisdiction in all cases in which United States nationals were defendants.

"The controversy between the Parties with regard to consular jurisdiction results from the renunciation of capitulatory rights and privileges by Spain in 1914 and by Great Britain in 1937. The renunciation by Spain in 1914 had no immediate effect upon the United States position because it was still possible to invoke the provisions of the General Treaty with Great Britain of 1856. After 1937, however, no Power other than the United States has exercised consular jurisdiction in the French Zone of Morocco and none has been entitled to exercise such jurisdiction.

"France contends that, from the date of the renunciation of the right of consular jurisdiction by Great Britain, the United States has not been entitled, either through the operation of the most-favoured-nation clauses of the Treaty of 1836 or by virtue of the provisions of any other treaty, to exercise consular jurisdiction beyond those cases which are covered by the provisions of Articles 20 and 21 of the Treaty of 1836.

"The United States Submission is based upon a series of contentions which must be dealt with in turn.

* * * * *

"The first contention is based upon Article 17 of the Madrid Convention of 1880, which reads as follows:

'The right to the treatment of the most favoured nation is recognized by Morocco as belonging to all the Powers represented at the Madrid Conference.'

"Even if it could be assumed that Article 17 operated as a general grant of most-favoured-nation rights to the United States and was not confined to the matters dealt with in the Madrid Convention, it would not follow that the United States is entitled to continue to invoke the provisions of the British and Spanish Treaties, after they have ceased to be operative as between Morocco and the two countries in question.

"The contention of the United States is based upon the view that most-favoured-nation clauses contained in treaties with countries like Morocco must be given a different construction from that which is accorded to similar clauses in treaties with other countries. Two special considerations need to be taken into account.

"The first consideration depends upon the principle of a personal law and the history of the old conflict between two

concepts of law and jurisdiction: the one based upon persons and the other upon territory. The right of consular jurisdiction was designed to provide for a situation in which Moroccan law was essentially personal in character and could not be applied to foreigners.

"The second consideration was based on the view that the most-favoured-nation clauses in treaties made with countries like Morocco should be regarded as a form of drafting by reference rather than as a method for the establishment and maintenance of equality of treatment without discrimination amongst the various countries concerned. According to this view, rights or privileges which a country was entitled to invoke by virtue of a most-favoured-nation clause, and which were in existence at the date of its coming into force, would be incorporated permanently by reference and enjoyed and exercised even after the abrogation of the treaty provisions from which they had been derived.

"From either point of view, this contention is inconsistent with the intentions of the parties to the treaties now in question. This is shown both by the wording of the particular treaties, and by the general treaty pattern which emerges from an examination of the treaties made by Morocco with France, the Netherlands, Great Britain, Denmark, Spain, United States, Sardinia, Austria, Belgium and Germany over the period from 1631 to 1892. These treaties show that the intention of the most-favoured-nation clauses was to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned. Further, the provisions of Article 17 of the Madrid Convention, regardless of their scope, were clearly based on the maintenance of equality.

"The contention would, therefore, run contrary to the principle of equality and it would perpetuate discrimination. It can not support the Submission of the United States regarding the extent of the consular jurisdiction in the French Zone.

* * * * *

"The second contention of the United States is based upon the geographically limited character of the renunciation of consular jurisdiction by Great Britain. This was restricted in its scope to the French Zone.

"It has been claimed on behalf of the United States that Great Britain retained its jurisdictional rights in the Spanish Zone and it has been argued that 'the United States, which still treats Morocco as a single country; is entitled under the most-favoured-nation clause in Article 24 of its treaty to the same jurisdictional rights which Great Britain today exercises in a part of Morocco by virtue of the Treaty of 1856'.

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“ The Court is not called upon to determine the existence or extent of the jurisdictional rights of Great Britain in the Spanish Zone. It is sufficient to reject this argument on the ground that it would lead to a position in which the United States was entitled to exercise consular jurisdiction in the French Zone notwithstanding the loss of this right by Great Britain. This result would be contrary to the intention of the most-favoured-nation clauses to establish and maintain at all times fundamental equality without discrimination as between the countries concerned.

“ Reliance has also been placed upon the position of France and French nationals as regards the new tribunals of the Protectorate, which have been established for the purpose of exercising jurisdiction over foreigners and applying Moroccan laws to them in the French Zone. These tribunals have been constituted with French aid and under French direction and supervision. It is suggested that these are, in reality, consular courts and that the United States is entitled to be placed, in this regard, in a position of equality with France.

“ But the tribunals of the protectorate in the French Zone are not in any sense consular courts. They are Moroccan courts, organized on French models and standards, affording guarantees of judicial equality to foreigners.

“ Accordingly the Court can not accept this contention.

* * * * *

“ The third contention of the United States is based upon the nature of the arrangements which led to the termination of Spanish consular jurisdiction in the French Zone. By a Convention between France and Spain of November 27, 1912, provision was made for the exercise by Spain of special rights and privileges in the Spanish Zone. By a bilateral Declaration between France and Spain of March 7, 1914, Spain surrendered its jurisdictional and other extraterritorial rights in the French Zone, and provision was made for the subsequent surrender by France of similar rights in the Spanish Zone. This was accomplished by a bilateral Declaration between France and Spain of November 17 of the same year.

“ The United States contends that, as both the Convention of 1912 and the Declarations of 1914 were agreements between France and Spain, and as Morocco was not named as a party to either agreement, the rights of Spain under the earlier provision still exist *de jure*, notwithstanding that there may be a *de facto* situation which temporarily prevents their exercise.

“ Even if this contention is accepted, the position is one in which Spain has been unable to insist on the right to exercise consular jurisdiction in the French Zone since 1914. The rights

which the United States would be entitled to invoke by virtue of the most-favoured-nation clauses would therefore not include the right to exercise consular jurisdiction in the year 1950. They would be limited to the contingent right of re-establishing consular jurisdiction at some later date in the event of France and Spain abrogating the agreements made by the Convention of 1912 and the Declarations of 1914.

“ France contends that these agreements were concluded pursuant to the power which Morocco conferred on France by the provisions of the Treaty of Fez of 1912. The general terms of Articles V and VI were broad enough to give to France the conduct of the international relations of Morocco, including the exercise of the treaty-making power. The Convention and the Declarations must therefore be regarded as agreements made by a protecting Power, within the scope of its authority, touching the affairs of and intended to bind the protected State, as is made clear by the third paragraph of Article I of the Treaty of Fez of 1912 which provided that: ‘ The Government of the Republic will come to an understanding with the Spanish Government regarding the interests which the latter Government has in virtue of its geographical position and territorial possessions on the Moroccan coast.’ In these circumstances, it is necessary to hold that these agreements bound and enured to the benefit of Morocco and that the Spanish rights as regards consular jurisdiction came to an end *de jure* as well as *de facto*.

“ It is necessary to deal with another aspect of this question which arises out of the wording of the Declaration made by France and Spain on March 7, 1914. This Declaration contained the following provisions:

‘ Taking into consideration the guarantees of judicial equality offered to foreigners by the French Tribunals of the Protectorate, His Catholic Majesty’s Government renounces claiming for its consuls, its subjects, and its establishments in the French Zone of the Shereefian Empire all the rights and privileges arising out of the régime of the Capitulations.

‘ So far as the Government of the French Republic is concerned, it binds itself to renounce equally the rights and privileges existing in favour of its consuls, its subjects, and its establishments in the Spanish Zone as soon as the Spanish Tribunals are established in the said Zone.

“ The Declaration whereby France complied with the above undertaking was made on November 17, 1914, and included the following paragraph:

‘ Taking into consideration the guarantees of judicial equality offered to foreigners by the Spanish Tribunals in the Protectorate,

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the Government of the French Republic hereby renounces claiming for its consuls, its subjects and its establishments in the Spanish Zone of the Shereefian Empire, all the rights and privileges arising out of the régime of the Capitulations.'

" It will be observed that both Declarations use the words '*renonce à réclamer*' (renounce claiming) and the question has arisen whether these words were intended as a surrender or renunciation of all the rights and privileges arising out of the capitulatory régime, or whether they must be considered as temporary undertakings not to claim those rights or privileges so long as the guarantees for judicial equality are maintained in the French Zone by the tribunals of the Protectorate and so long as the corresponding guarantees are maintained in the Spanish Zone.

" The question is academic rather than practical. Even if the words in question should be construed as meaning a temporary undertaking not to claim the rights and privileges, the fact remains that Spain, in 1950, as a result of these undertakings was not entitled to exercise consular jurisdiction in the French Zone. It follows that the United States would be equally not entitled to exercise such jurisdiction in the French Zone in the year 1950.

" Nevertheless, it is necessary for the Court to examine these Declarations in order to determine what the parties had in mind when they used the words in question.

" The parties in both Declarations used the expression 'taking into consideration the guarantees of judicial equality . . .'. These are words which, if given their ordinary and natural meaning, state the consideration which led to the making of the surrender, but they are not words which would normally be used if it was intended to make a conditional surrender.

" The Court is of opinion that the words '*renonce à réclamer*' must be regarded as an out-and-out renunciation of the capitulatory rights and privileges. This view is confirmed by taking into account the declarations and other arrangements made by France with other interested Powers designed to bring about the surrender of their jurisdictional and other extraterritorial rights in the French Zone.

" The two Declarations made by France and Spain in 1914 show that they both regarded the expression '*renonce à réclamer*' as equivalent to a renunciation of the rights in question. In the Declaration of March 7, 1914, the French Government bound itself 'to renounce equally the rights and privileges . . .'. In the later Declaration of November 17, 1914, France gave effect to this obligation by using the expression '*renonce à réclamer*'. It is clear, therefore, that both

France and Spain regarded this expression as proper for bringing about a complete surrender or renunciation of the rights and privileges in question.

" On July 31, 1916, the French Ambassador at Washington sent to the Secretary of State of the United States ' the text of the Declaration signed, with reference to the abrogation of capitulations in the French Zone of Morocco, by all the Powers signatory of the Algeciras Conference and by the South-American Republics '. In the text, thus transmitted, the expression used in English was ' relinquishes its claim to all the rights and privileges growing out of the Capitulation régime . . . '. It is thus clear that at that date, long before the present dispute had arisen, France regarded the expression ' relinquishes its claim ' (or, in other words, '*renonce à réclamer*') as bringing about the abrogation of the privileges in question.

" The Declaration made by France and Spain of March 7, 1914, was one of a series of agreements negotiated by France with more than twenty foreign States ' for the surrender of their jurisdictional and other extraterritorial rights so far as concerned the French Zone of Morocco '. At least seventeen of these agreements used the expression '*renonce à réclamer*' as a means of bringing about a complete abrogation of all rights and privileges arising out of the régime of Capitulations. They are referred to in the Counter-Memorial in the following words: ' for the surrender of their jurisdictional and other extraterritorial rights ', and again, ' for the renunciation of extraterritorial rights '. Further, all of the States which had signed these agreements abandoned forthwith the exercise of consular jurisdiction or other capitulatory rights or privileges in the French Zone.

" In these circumstances, it is necessary to conclude that the Spanish Declaration of March 7, 1914, brought about the surrender or renunciation of all Spanish jurisdictional or other extraterritorial rights in the French Zone, and an abrogation of those provisions of the Spanish Treaty of 1861 which concern ' the rights and privileges arising out of the régime of Capitulations '.

" The Court, therefore, can not accept the contention that the United States is entitled, by virtue of the most-favoured-nation clauses, to invoke in respect of the French Zone those provisions of the Spanish Treaty of 1861 which concern consular jurisdiction.

* * * * *

" The fourth contention of the United States is that the extensive consular jurisdiction as it existed in Morocco in the year 1880 was recognized and confirmed by the provisions of the

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Madrid Convention, and that the United States, as a party to that Convention, thereby acquired an autonomous right to the exercise of such jurisdiction, independently of the operation of the most-favoured-nation clauses.

“ There can be no doubt that the exercise of consular jurisdiction in Morocco in the year 1880 was general, or that the Convention presupposed the existence of such jurisdiction. It dealt with the special position of protégés and contained provisions for the exercise of jurisdiction with regard to them.

“ On the other hand, it is equally clear that there were no provisions of the Convention which expressly brought about a confirmation of the then existing system of consular jurisdiction, or its establishment as an independent and autonomous right.

“ The purposes and objects of this Convention were stated in its Preamble in the following words: ‘ the necessity of establishing, on fixed and uniform bases, the exercise of the right of protection in Morocco and of settling certain questions connected therewith . . . ’. In these circumstances, the Court can not adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects. Further, this contention would involve radical changes and additions to the provisions of the Convention. The Court, in its Opinion—Interpretation of Peace Treaties (Second Phase) (*I.C.J. Reports 1950*, p. 229)—stated: ‘ It is the duty of the Court to interpret the Treaties, not to revise them.’

“ The fifth contention of the United States is that the consular jurisdiction in Morocco was recognized and confirmed by various provisions of the Act of Algeciras, and that the United States acquired an autonomous right to exercise such jurisdiction independently of the operation of the most-favoured-nation clauses.

“ In 1906 the twelve Powers at Algeciras all exercised capitulatory rights and privileges to the extent that they were prescribed either by the General Treaty with Great Britain of 1856 or by the Spanish Treaty of 1861. They did so by virtue of direct treaty grant, as in the case of Great Britain or Spain; or by virtue of most-favoured-nation clauses, as in the case of the United States; or without treaty rights, but with the consent or acquiescence of Morocco, as in the case of certain other States. Accordingly, the Act of Algeciras pre-supposed the existence of the régime of Capitulations, including the rights of consular jurisdiction, and many of its provisions assigned particular functions to the then existing consular tribunals. Reference has been made in the course of the argument to Articles 19, 23, 24, 25, 29, 45, 59, 80, 81, 87, 91, 101, 102 and 119. For example, Chapter V, which deals with ‘ the customs of the

Empire and the repression of fraud and smuggling', contains Article 102, which provides:

'Every confiscation, fine or penalty must be imposed on foreigners by consular jurisdiction, and on Moorish subjects by Shereefian jurisdiction.'

"In the conditions which existed at the time, this Article made it necessary for the prosecution of nationals of the twelve Powers for fraud and smuggling to be dealt with in the consular courts.

"Since 1937, the position has been one in which eleven of the Powers have abandoned their capitulatory privileges, and their consular jurisdiction has ceased to exist. Accordingly, Morocco has been able to make laws and to provide for the trial and punishment of offenders who are nationals of these eleven countries. The position of the United States is different, and must now be examined.

"Unlike the Madrid Convention, the Act of Algeiras was general in its scope and was not confined to a limited problem such as that of protection. On the other hand, the interpretation of the provisions of the Act must take into account its purposes, which are set forth in the Preamble in the following words:

'Inspired by the interest attaching itself to the reign of order, peace, and prosperity in Morocco, and recognizing that the attainment thereof can only be effected by means of the introduction of reforms based upon the triple principle of the sovereignty and independence of His Majesty the Sultan, the integrity of his domains, and economic liberty without any inequality. . . .'

"Neither the Articles to which reference has been made above nor any other provisions of the Act of Algeiras purport to establish consular jurisdiction or to confirm the rights or privileges of the régime of Capitulations which were then in existence. The question, therefore, is whether the establishment or confirmation of such jurisdiction or privileges can be based upon the implied intentions of the parties to the Act as indicated by its provisions.

"An interpretation, by implication from the provisions of the Act, establishing or confirming consular jurisdiction would involve a transformation of the then existing treaty rights of most of the twelve Powers into new and autonomous rights based upon the Act. It would change treaty rights of the Powers, some of them terminable at short notice, *e.g.*, those of the United States which were terminable by twelve months' notice, into rights enjoyable for an unlimited period by the Powers and incapable of being terminated or modified by Morocco. Neither the preparatory work nor the Preamble gives the least indication of any such intention. The Court

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finds itself unable to imply so fundamental a change in the character of the then existing treaty rights as would be involved in the acceptance of this contention.

" There is, however, another aspect of this problem arising out of the particular Articles to which reference has been made above. These are the Articles which include provisions necessarily involving the exercise of consular jurisdiction. In this case, there is a clear indication of the intention of the parties to the effect that certain matters are to be dealt with by the consular tribunals and to this extent it is possible to interpret the provisions of the Act as establishing or confirming the exercise of consular jurisdiction for these limited purposes. The maintenance of consular jurisdiction in so far as it may be necessary to give effect to these specific provisions can, therefore, be justified as based upon the necessary intendment of the provisions of the Act.

" This result is confirmed by the provisions of Articles 10 and 16 of the Convention between Great Britain and France of July 29th, 1937. These Articles refer to the jurisdictional privileges ' accorded on the basis of existing treaties ' or ' enjoyed by the United States of America under treaties at present in force '. They pre-suppose, therefore, that the jurisdictional privileges of the United States, even after the surrender of British capitulatory rights, would not be limited to the jurisdiction provided by Articles 20 and 21 of the Treaty with Morocco of 1836. This view is also supported by the provisions of Article 4 of the Protocol of Signature to this Convention. This Article provided for the abrogation of certain provisions of the General Treaty of 1856 and, as regards the Act of Algeciras, for the renunciation ' of the right to rely upon Articles 1 to 50, 54 to 65, 70, 71, all provisions of Article 72 after the word " permit ", 75, 76, 80, 97, 101, 102, 104, 113 to 119 ', and it also provided that ' in Article 81 the words " by the competent consular authority " must be deemed to be omitted and in Article 91, the word " competent " must henceforth be substituted for the word " consular " .'

" It is clear that, in 1937, France (representing Morocco) and Great Britain were proceeding upon the assumption that certain of the provisions of the Act of Algeciras recognized a limited consular jurisdiction for the purposes of the judicial proceedings therein described.

" The Court is not called upon to examine the particular articles of the Act of Algeciras which are involved. It considers it sufficient to state as its opinion that the consular jurisdiction of the United States continues to exist to the extent that may be necessary to render effective those provisions of the Act of Algeciras which depend on the existence of consular jurisdiction.

“ This interpretation of the Act, in some instances, leads to results which may not appear to be entirely satisfactory. But that is an unavoidable consequence of the manner in which the Algeciras Conference dealt with the question of consular jurisdiction. The Court can not, by way of interpretation, derive from the Act a general rule as to full consular jurisdiction which it does not contain. On the other hand, the Court can not disregard particular provisions involving a limited resort to consular jurisdiction, which are, in fact, contained in the Act, and which are still in force as far as the relations between the United States and Morocco are concerned.”

[III. *Acquisition of Capitulatory Rights by Custom.*].—“ The sixth contention of the United States is that its consular jurisdiction and other capitulatory rights in Morocco are founded upon ‘ custom and usage ’.

“ This contention has been developed in two different ways. The first relates to custom and usage preceding the abandonment of capitulatory rights in the French Zone by Great Britain in 1937. The second relates to the practice since that date.

“ Dealing first with the period of 150 years, 1787 to 1937, there are two considerations which prevent the acceptance of this contention.

“ The first is that throughout this whole period, the United States consular jurisdiction was in fact based, not on custom or usage, but on treaty rights. At all stages, it was based on the provisions either of the Treaty of 1787 or of the Treaty of 1836, together with the provisions of treaties concluded by Morocco with other Powers, especially with Great Britain and Spain, invoked by virtue of the most-favoured-nation clauses. This was the case not merely of the United States but of most of the countries whose nationals were trading in Morocco. It is true that there were Powers represented at the Conference of Madrid in 1880 and at Algeciras in 1906 which had no treaty rights but were exercising consular jurisdiction with the consent or acquiescence of Morocco. It is also true that France, after the institution of the Protectorate, obtained declarations of renunciation from a large number of other States which were in a similar position. This is not enough to establish that the States exercising consular jurisdiction in pursuance of treaty rights enjoyed in addition an independent title thereto based on custom or usage.

“ The second consideration relates to the question of proof. This Court, in the *Asylum Case* (*I.C.J. Reports 1950*, pp. 276-277), when dealing with the question of the establishment of a local custom peculiar to Latin-American States, said:

‘ The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has

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become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law";

"In the present case there has not been sufficient evidence to enable the Court to reach a conclusion that a right to exercise consular jurisdiction founded upon custom or usage has been established in such a manner that it has become binding on Morocco.

"This contention has also been based upon the practice since the date when the treaty right of the United States to exercise extended consular jurisdiction and derivative rights came to an end with the coming into operation of the Convention between France and Great Britain of 1937.

"During this period France and the United States were in negotiation with regard to a number of questions, including the renunciation of capitulatory rights. There are isolated expressions to be found in the diplomatic correspondence which, if considered without regard to their context, might be regarded as acknowledgements of United States claims to exercise consular jurisdiction and other capitulatory rights. On the other hand, the Court can not ignore the general tenor of the correspondence, which indicates that at all times France and the United States were looking for a solution based upon mutual agreement and that neither Party intended to concede its legal position. In these circumstances, the situation in which the United States continued after 1937 to exercise consular jurisdiction over all criminal and civil cases in which United States nationals were defendants, is one that must be regarded as in the nature of a provisional situation acquiesced in by the Moroccan authorities.

"Accordingly, it is necessary to conclude that, apart from the special rights under Articles 20 and 21 of the Treaty of 1836 and those which arise from the provisions of the Act of Algeciras, to which reference has been made above, the United States claim to exercise and enjoy, as of right, consular jurisdiction and other capitulatory rights in the French Zone came to an end with the termination of 'all rights and privileges of a capitulatory character in the French Zone of the Shereefian Empire' by Great Britain, in pursuance of the provisions of the Convention of 1937."

[IV. *Capitulatory Régime. Right of Assent to Legislation.*]—
"The Court will now consider the claim that United States

nationals are not subject, in principle, to the application of Moroccan laws, unless they have first received the assent of the United States Government.

“ The French Submission in this regard reads as follows:

‘ That the Government of the United States of America is not entitled to claim that the application of all laws and regulations to its nationals in Morocco requires its express consent;

‘ That the nationals of the United States of America in Morocco are subject to the laws and regulations in force in the Shereefian Empire and in particular the regulation of December 30, 1948, on imports not involving an allocation of currency, without the prior consent of the United States Government.’

“ The United States Submission in this regard reads as follows:

‘ 4. Under the régime of extraterritorial jurisdiction now exercised by the United States in Morocco, United States citizens are not subject, in principle, to the application of Moroccan laws.

‘ Such laws become applicable to the United States citizens only if they are submitted to the prior assent of the United States Government and if this Government agrees to make them applicable to its citizens. The Dahir of December 30, 1948, not having been submitted to the prior assent of the United States Government, cannot be made applicable to United States citizens.’

“ The claim that Moroccan laws are not binding on United States nationals, unless assented to by the Government of the United States, is linked with the régime of Capitulations, and it will not be necessary to repeat the considerations which have already been discussed in dealing with consular jurisdiction.

“ There is no provision in any of the treaties which have been under consideration in this case conferring upon the United States any such right. The so-called ‘ right of assent ’ is merely a corollary of the system of consular jurisdiction. The consular courts applied their own law and they were not bound in any way by Moroccan law or Moroccan legislation. Before a consular court could give effect to a Moroccan law it was necessary for the foreign Power concerned to provide for its adoption as a law binding on the consul in his judicial capacity. It was the usual practice to do this by embodying it either in the legislation of the foreign State or in ministerial or consular decrees of that State issued in pursuance of delegated powers. The foreign State could have this done or it could refuse to provide for the enforcement of the law. There was a ‘ right of assent ’ only to the extent that the intervention of the consular court was necessary to secure the effective enforcement of a Moroccan law as against the foreign nationals.

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“ In the absence of any treaty provisions dealing with this matter, it has been contended that a ‘ right of assent ’ can be based on custom, usage or practice. It is unnecessary to repeat the reasons which have been given for rejecting custom, usage and practice as a basis for extended consular jurisdiction, and which are largely applicable to the ‘ right of assent ’. It is, however, necessary to point out that the very large number of instances in which Moroccan laws were referred to the United States authorities can readily be explained as a convenient way of ensuring their incorporation in ministerial decrees binding upon the consular courts. In that way, and in that way only, could these laws be made enforceable as against United States nationals so long as the extended consular jurisdiction was being exercised.

“ The problem arises in three ways, which must be considered separately.

“ The first is in cases where the application of a Moroccan law to United States nationals would be contrary to the treaty rights of the United States. In such cases, the application of Moroccan laws, whether directly or indirectly to these nationals, unless assented to by the United States, would be contrary to international law, and the dispute which might arise therefrom would have to be dealt with according to the ordinary methods for the settlement of international disputes. These considerations apply to the Decree of December 30, 1948, which the Court has found to be contrary to treaty rights of the United States.

“ The second way in which the problem arises is in cases in which the co-operation of the consular courts is required in order to enforce the Moroccan legislation. In such cases, regardless of whether the application of the legislation would contravene treaty rights, the assent of the United States would be essential to its enforcement by the consular courts.

“ The third way in which the problem arises is in cases where the application to United States nationals, otherwise than by enforcement through the consular courts, of Moroccan laws which do not violate any treaty rights of the United States is in question. In such cases the assent of the United States authorities is not required.

“ Accordingly, and subject to the foregoing qualifications, the Court holds that the United States is not entitled to claim that the application of laws and regulations to its nationals in the French Zone requires its assent.”

[*V. Capitulatory Régime and Immunity from Taxation.*]—
“ The Government of the United States of America has submitted a Counter-Claim, a part of which relates to the question of immunity from Moroccan taxes in general, and particularly from the consumption taxes provided by the Shereefian Dahir

of February 28, 1948. The following Submissions are presented with regard to these questions:

“ On behalf of the Government of the United States:

‘ 2. The treaties exempt American nationals from taxes, except as specifically provided by the same treaties; to collect taxes from American nationals in violation of the terms of the treaties is a breach of international law.

‘ Such taxes can legally be collected from American nationals only with the previous consent of the United States which operates to waive temporarily its treaty right, and from the date upon which such consent is given, unless otherwise specified by the terms of the consent.

‘ Consumption taxes provided by the Dahir of February 28, 1948, which were collected from American nationals up to August 15, 1950, the date on which the United States consented to these taxes, were illegally collected and should be refunded to them.

‘ 3. Since Moroccan laws do not become applicable to American citizens until they have received the prior assent of the United States Government, the lack of assent of the United States Government to the Dahir of February 28, 1948, rendered illegal the collection of the consumption taxes provided by that Dahir.’

“ On behalf of the Government of France:

‘ That no treaty has conferred on the United States fiscal immunity for its nationals in Morocco, either directly or through the effect of the most-favoured-nation clause ;

‘ That the laws and regulations on fiscal matters which have been put into force in the Shereefian Empire are applicable to the nationals of the United States without the prior consent of the Government of the United States;

‘ That, consequently, consumption taxes provided by the Dahir of February 28, 1948, have been legally collected from the nationals of the United States, and should not be refunded to them.’

“ The Government of the United States contends that its treaty rights in Morocco confer upon United States nationals an immunity from taxes except the taxes specifically recognized and permitted by the treaties. This contention is based on certain bilateral treaties with Morocco as well as on the Madrid Convention of 1880 and the Act of Algeciras of 1906.

“ The Court will first consider the contention that the right to fiscal immunity can be derived from the most-favoured-nation clauses in Article 24 of the Treaty between the United States and Morocco of 1836 and in Article 17 of the Madrid Convention, in conjunction with certain provisions in treaties between Morocco and Great Britain and Morocco and Spain.

“ The General Treaty between Great Britain and Morocco

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of 1856 provided in the second paragraph of Article IV that British subjects 'shall not be obliged to pay, under any pretence whatever, any taxes or impositions'. The Treaty between Morocco and Spain of 1861 provided in Article V that 'Spanish subjects can not under any pretext be forced to pay taxes or contributions.'

" It is submitted on behalf of the United States that the most-favoured-nation clauses in treaties with countries like Morocco were not intended to create merely temporary or dependent rights, but were intended to incorporate permanently these rights and render them independent of the treaties by which they were originally accorded. It is consequently contended that the right to fiscal immunity accorded by the British General Treaty of 1856 and the Spanish Treaty of 1861, was incorporated in the treaties which guaranteed to the United States most-favoured-nation treatment, with the result that this right would continue even if the rights and privileges granted by the Treaties of 1856 and 1861 should come to an end.

" For the reasons stated above in connection with consular jurisdiction, the Court is unable to accept this contention. It is not established that most-favoured-nation clauses in treaties with Morocco have a meaning and effect other than such clauses in other treaties or are governed by different rules of law. When provisions granting fiscal immunity in treaties between Morocco and third States have been abrogated or renounced, these provisions can no longer be relied upon by virtue of a most-favoured-nation clause. In such circumstances, it becomes necessary to examine whether the above-mentioned provisions in the Treaties of 1856 and 1861 are still in force.

" The second paragraph of Article IV in the General Treaty with Great Britain was abrogated by the Franco-British Convention of July 29, 1937, Protocol of Signature, Article 4 (a). As from the coming into force of this Convention, that paragraph of Article IV of the General Treaty of 1856 could no longer be relied upon by the United States by virtue of a most-favoured-nation clause.

" As already held above, the effect of the Declaration made by France and Spain of March 7, 1914, was an unconditional renunciation by Spain of all the rights and privileges arising out of the régime of Capitulations in the French Zone. This renunciation involved, in the opinion of the Court, a renunciation by Spain of the right of its nationals to immunity from taxes under Article V of its Treaty with Morocco of 1861, since such a general and complete immunity from taxes must be considered as an element of the régime of capitulations in Morocco. When Spain relinquished all the capitulatory rights,

it must thereby be considered as having given up the right to fiscal immunity.

“ This view is confirmed by the attitude taken by a number of other States in this respect. Great Britain renounced all rights and privileges of a capitulatory character in the French Zone by Article 1 of its Convention with France of 1937. In the Protocol of Signature it was declared that the effect of this Article and of Article 16 is to abrogate a number of articles in the General Treaty of 1856, including, as has been stated above, the second paragraph of Article IV. This seems to show that France, representing Morocco, and Great Britain were proceeding on the assumption that the tax immunity accorded by that Article was a right of a capitulatory character. The other States, which, during the years 1914-1916, equally renounced all rights and privileges arising out of the régime of Capitulations in the French Zone, have acquiesced in the taxation of their nationals.

“ For these reasons, the Court holds that the right to tax immunity accorded by Article V of the Spanish Treaty of 1861, having been surrendered by Spain, can no longer be invoked by the United States by virtue of a most-favoured-nation clause.

“ The Government of the United States has further contended that it has an independent claim to tax immunity by virtue of being a party to the Convention of Madrid and the Act of Algeciras. It contends that by these instruments a régime as to taxes was set up, which continued the tax immunity in favour of the nationals of foreign States, thereby confirming and incorporating this pre-existing régime, which therefore is still in force, except for the States which have agreed to give it up.

“ The Court is, however, of opinion that the Madrid Convention did not confirm and incorporate the then existing principle of tax immunity. It merely pre-supposed the existence of this principle and curtailed it by exceptions in Articles 12 and 13 without modifying its legal basis. It did not provide a new and independent ground for any claim of tax immunity.

“ Similar considerations apply to the Act of Algeciras, which further curtailed the régime of tax immunity by exceptions in Articles 59, 61, 64 and 65. It did not provide any new and independent legal basis for exemption from taxes.

“ The Government of the United States has invoked Articles 2 and 3 of the Madrid Convention, which grant exemption from taxes, other than those mentioned in Articles 12 and 13, to certain ‘ protected persons ’. But the ‘ protégés ’ mentioned in Articles 2 and 3 constituted only a limited class of persons in the service of diplomatic representatives and consuls of foreign States. No conclusion as to tax immunity for nationals of the

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United States in general can, in the opinion of the Court, be drawn from the privileges granted to this limited class of protected persons.

“ It is finally contended, on behalf of the Government of the United States, that the consumption taxes imposed by the Dahir of February 28, 1948, are in contravention of special treaty rights. Reference is made to the Treaty of Commerce between Great Britain and Morocco of 1856, Articles III, VII, VIII and IX, and it is submitted that United States nationals are exempt from those consumption taxes by virtue of these Articles in conjunction with the most-favoured-nation clauses in the Treaty of 1836 between Morocco and the United States.

“ These four Articles in the British Commercial Treaty of 1856 relate to taxes and duties on goods exported from or imported into Morocco, or on goods conveyed from one Moroccan port to another. The consumption taxes provided by the Dahir of February 28, 1948, are, according to its Article 8, payable on all products whether they are imported into the French Zone of Morocco or manufactured or produced there. They can not, therefore, be assimilated to the particular taxes mentioned in the articles of the British Commercial Treaty, invoked by the United States, nor can they be considered as a customs duty. The mere fact that it may be convenient in the case of imported goods to collect the consumption tax at the Customs Office does not alter its essential character as a tax levied upon all goods, whether imported into, or produced in, Morocco. It may be recalled in this connection that the Permanent Court of International Justice recognized that fiscal duties collected at the frontier on the entry of certain goods were not to be confused with customs duties; in its Judgment of June 7, 1932, in the Free Zones Case (P.C.I.J., Series A/B, No. 46, p. 172), it laid down that ‘ the withdrawal of the customs line does not affect the right of the French Government to collect at the political frontier fiscal duties not possessing the character of customs duties.’

“ The Court is, consequently, unable to hold that the imposition of these consumption taxes contravenes any treaty rights of the United States. In such circumstances the question of a partial refund of consumption taxes paid by United States nationals does not arise.

“ It follows from the above-mentioned considerations that the Government of the United States is not entitled to claim that taxes, including consumption taxes, shall be submitted to the previous consent of that Government before they can legally be collected from nationals of the United States. Since they are, in the opinion of the Court, not exempt from the payment of any taxes in the French Zone, there is no legal basis

for the claim that laws and regulations on fiscal matters shall be submitted to United States authorities for approval.

"The conclusion which the Court has thus arrived at seems to be in accordance with the attitude which other States have taken with regard to this question. Tax immunity in the French Zone is not claimed either by the United Kingdom or by Spain or any other State which previously enjoyed such a privileged position. The only State now claiming this privilege is the United States, though no tax immunity is guaranteed by its Treaty with Morocco of 1836. To recognize tax immunity for United States nationals alone would not be compatible with the principle of equality of treatment in economic matters on which the Act of Algeciras is based."

[VI. *Equality of Treatment and the Method of Assessment of Customs Duties.*]—"The final Submission of the United States of America upon that part of its Counter-Claim which is based upon Article 95 of the General Act of Algeciras, is as follows:

'1. Under Article 95 of the Act of Algeciras, the value of imports from the United States must be determined for the purpose of customs assessments by adding to the purchase value of the imported merchandise in the United States the expenses incidental to its transportation to the custom-house in Morocco, exclusive of all expenses following its delivery to the custom-house, such as customs duties and storage fees.

'It is a violation of the Act of Algeciras and a breach of international law for the customs authorities to depart from the method of valuation so defined and to determine the value of imported merchandise for customs purposes by relying on the value of the imported merchandise on the local Moroccan market.'

"The final Submission of the Government of France upon this part of the Counter-Claim is as follows:

'That Article 95 of the Act of Algeciras defines value for customs purposes as the value of the merchandise at the time and at the place where it is presented for customs clearance';

which, as was made clear in the oral argument, means the value in the local, *i.e.*, Moroccan, market.

"The necessity, evidenced by Articles 95, 96 and 97 of the Act of Algeciras, of creating some kind of machinery for securing a just valuation of goods by the Customs authorities would appear to follow, *inter alia*, (a) from the principle of economic equality which is one of the principles underlying the Act, and (b) from the fact that the import duties were fixed by the Signatory Powers at 12½ per cent. Clearly, it would be easy, if it were desired to do so, to discriminate against particular importers by means of arbitrary valuations or to evade a fixed limitation of duties by means of inflated valuations. But while

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the signatory Powers realized the necessity for some such machinery, it does not appear that the machinery has given rise to a practice which has been consistently followed since the Act entered into force.

“ Article 95 specifies four factors in valuing merchandise:

‘ (a) the valuation must be based upon its cash wholesale value ;

‘ (b) the time and place of the valuation are fixed at the entry of the merchandise at the custom-house ;

‘ (c) the merchandise must be valued “ free from customs duties and storage dues ”, that is to say, the value must not include these charges;

‘ (d) the valuation must take account of depreciation resulting from damage, if any.’

“ Article 96, which relates only to the principal goods taxed by the Moorish Customs Administration, contemplated an annual fixing of values by a ‘ Committee on Customs Valuations ’ sitting at Tangier. The local character of this Committee, and of the persons whom it is directed to consult, should be noted. The schedule of values fixed by it was to be subject to revision at the end of six months if any considerable changes had taken place in the value of certain goods. Article 96 is procedural and is intended to operate within the ambit of Article 95.

“ Article 97 provided for the establishment of a permanent ‘ Committee of Customs ’, intended to supervise the customs service on a high level and to watch over the application of Articles 96 and 97, subject to the advice and consent of the ‘ Diplomatic Body at Tangier ’.

“ The Committee on Customs Valuations referred to in Article 96 appears to have lapsed in 1924 when the Convention of December 18, 1923, on the Tangier Zone came into force, and replaced it by a Committee representing the three Zones. The latter Committee has not met since 1936.

“ Articles 82 to 86 of the Act, which relate to declarations by importers, must also be noted. Article 82 requires an importer to file a declaration, which must contain a detailed statement setting forth the nature, quality, weight, number, measurement and value of the merchandise, as well as the nature, marks and numbers of the packages containing the same. A declaration of value made by the importer can clearly not be decisive, because he is an interested party, but at the same time he knows more about the goods than anybody else, and, unless fraud is suspected, it is right that the value appearing in the declaration should form an important element in the valuation about to be made.

“ It can not be said that the provisions of Article 95 alone,

or of Chapter V of the Act considered as a whole, afford decisive evidence in support of either of the interpretations contended for by the Parties respectively. The four factors specified by Article 95 are consistent with either interpretation; in particular, the expression 'free from customs duties and storage dues' affords no clear indication, because, if the value in the country of origin, increased by the amount of insurance, freight, etc., is to be taken as the basis, this expression means 'before entering the customs office and paying duties'; whereas, if the value in the local market is to be accepted as the basis, some such expression is necessary (or at any rate prudent) in order to indicate that the duty of $12\frac{1}{2}$ per cent. must not be levied on a value which already contains the $12\frac{1}{2}$ per cent.

"The Court has examined the earlier practice, and the preparatory work of the Conference of Algeiras of 1906, but not much guidance is obtainable from these sources. The Commercial Agreement made between France and Morocco, dated October 4, 1892, consists of two letters exchanged between the Foreign Minister of Morocco and the Minister of France in Morocco, the latter of which contains the expression:

'These goods shall be assessed on the basis of their cash wholesale market value in the port of discharge, in reals of vellon.'

"A preliminary draft of the Act (p. 97 of French *Documents diplomatiques*, 1906, *fascicule 1, Affaires du Maroc*, entitled 'II. Protocoles et comptes rendus de la Conférence d'Algé-siras'), contains the following article:

'*Article XIX.*—Import and export duties shall be paid forth-with in cash at the custom-house where clearance is effected. The *ad valorem* duties shall be determined and paid on the basis of the cash wholesale value of the goods at the port of discharge or the custom-house in the case of imports. Merchandise can only be removed after the payment of customs duties and storage.

'The holding of the goods or the collection of duty shall, in every case, be made the subject of a regular receipt delivered by the officer in charge.'

Later (p. 100), upon a British proposal, the second sentence was modified so as to read:

"The *ad valorem* duties shall be determined and paid on the basis of the cash wholesale value of the goods at the custom-house, free from customs duties."

At a later stage the German delegation made the following proposal (*ibid.*, p. 232):

'The *ad valorem* duties imposed on imports in Morocco shall be assessed on the value of the imported goods in the place of

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shipment or of purchase, to which shall be added the transport and insurance charges to the port of discharge in Morocco. . . .’

That amendment was rejected, from which it may be inferred that the value in the country of origin was rejected as the conclusive test.

“ It is also necessary to examine the practice of the customs authorities since 1906, in so far as it appears from the materials made available to the Court by the Parties. It seems that there has been a reluctance to attribute a decisive effect to any single factor in valuing merchandise.

“ For instance, in a letter of July 16, 1912, from the Controller of Moroccan Customs to the American Minister at Tangier, it is stated that the customs officers ‘ apply for the appraisal of merchandise the rules established by the Act of Algeciras and by the Customs regulations. They use market prices, bills of sale and their professional knowledge.’

“ The following excerpts occur later in the same letter:

‘ The bill of sale is an element of valuation, but it is not conclusive evidence.

‘ The customs has always proceeded as described above in regard to petroleum products imported from Fiume and from Trieste; for which importers furnish means of appraisal by attaching to the declarations the original bills of sale, of which the prices are compared with the market prices of origin.

‘ This value [*i.e.* for customs purposes] includes the purchase price of the petroleum f.o.b. New York, increased by all expenses subsequent to the purchase, such as export duties paid to foreign customs, transportation, packing, freight, insurance, handling, unloading, etc.—in short, all that contributes to make up at the moment of presentation at the customs office the cash wholesale value of the product, according to which, under Article 95 of the Act of Algeciras, the duties must be paid.

“ It is also interesting to note from the Minutes of the meeting at Tangier of the Committee on Customs Valuations on June 7, 1933, that the Director of Customs explained:

‘ . . . that his Department adopts as elements of valuation for the application of the duties concerned, the invoice of origin, transport costs to the port of importation, the value of the merchandise on the local market on arrival, general market price lists and any other information which may be useful to fix the value upon which the duty is based.’

“ On the other hand, passages can be found in the Customs regulations and in circulars issued by the Moroccan Debt Control in which the emphasis is laid upon the value in the Moroccan market as the important factor. The latest ‘ Tables

of minimum and maximum values of the principal merchandise imported into Morocco', adopted by the Committee on Customs Valuations at their last meeting on March 11, 1936, at Tangier, reveal a range so great that they could only afford the most general guidance as to the actual valuation of a particular cargo or piece of merchandise.

"The general impression created by an examination of the relevant materials is that those responsible for the administration of the customs since the date of the Act of Algeciras have made use of all the various elements of valuation available to them, though perhaps not always in a consistent manner.

"In these circumstances, the Court is of the opinion that Article 95 lays down no strict rule on the point in dispute. It requires an interpretation which is more flexible than either of those which are respectively contended for by the Parties in this case.

"The Court is of the opinion that it is the duty of the Customs authorities in the French Zone, in fixing the valuation of imported goods for customs purposes, to have regard to the following factors:

(a) the four factors specified by Article 95 and mentioned above;

(b) the contents of the declaration which the importer is required by the Act to file in the custom-house;

(c) The wholesale cash value in the market of the French Zone;

(d) the cost in the country of origin, increased by the cost of loading and unloading, insurance, freight, and other charges incurred before the goods are delivered at the custom-house;

(e) the schedule of values, if any, which may have been prepared by the Committee on Customs Valuations referred to in Article 96 or by any committee which may have been substituted therefor by arrangements to which France and the United States have assented expressly or by implication;

(f) any other factor which is required by the special circumstances of a particular consignment or kind of merchandise.

"The factors referred to above are not arranged in order of priority but should operate freely, within any limits that have been, or may be, prescribed under Article 96 of the Act; and, in view of the governing principle of economic equality, the same methods must be applied without discrimination to all importations, regardless of the origin of the goods or the nationality of the importers. The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith."

[Report: *I. C. J.*, 1952, p. 176.]

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Judge Hsu Mo declared that, in his opinion,

"The jurisdictional rights of the United States of America in the French Zone of Morocco are limited to those provided in Articles 20 and 21 of its Treaty with Morocco of September 16, 1836, and that the United States is not entitled to exercise consular jurisdiction in cases involving the application to United States citizens of those provisions of the Act of Algeciras of 1906 which, for their enforcement, carried certain sanctions. The Act of Algeciras, as far as the jurisdictional clauses are concerned, was concluded on the basis of a kind of consular jurisdiction as it existed at that time in its full form and in complete uniformity among the Powers in Morocco. The various provisions, in referring to 'consular jurisdiction', 'competent consular authority', 'consular court of the defendant', etc., clearly meant that jurisdiction which was being uniformly exercised by foreign States over their respective nationals as defendants in all cases. They did not mean such limited jurisdiction as might be exercised by the United States consular courts, in accordance with Article 20 of the Moroccan-United States Treaty of 1836, in cases involving United States citizens or protégés only. When, therefore, consular jurisdiction in its full form ceased to exist in respect of all the signatory States to the Act of Algeciras, the basis for the application by the various consular tribunals of the measures of sanction provided in that Act disappeared, and the ordinary rules of international law came into play. Consequently, such sanctions should thenceforth be applied by the territorial courts, in the case of United States citizens as well as in the case of all other foreign nationals. As regards reference in the Franco-British Convention of 1937 to the jurisdictional privileges enjoyed by the United States, it must be considered as a precautionary measure on the part of France against the possibility of the refusal of the United States to relinquish such privileges. In any case, the rights of the United States *vis-à-vis* Morocco in matters of jurisdiction, must be determined by their own treaty relations, and could not derive from any admission made by France on Morocco's behalf to a third party."

Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau delivered a Dissenting Opinion in the following terms:

"We feel bound to dissent from the Court on the conclusions relating to consular jurisdiction, fiscal immunity and the interpretation of Article 95 of the Act of Algeciras.

"*Consular jurisdiction*

"The Court has found that the United States is not entitled to exercise, as of right, consular jurisdiction in the French Zone of Morocco in cases other than those expressly provided for in the Treaty of 1836 (Articles 20 and 21) and in the Act of Algeciras.

"There is hardly any one today who will question the general proposition that what is known as the capitulatory régime is an anachronism which should be brought to a speedy end, wherever it exists. In fact the United States Government itself has at all times been ready to negotiate with both France and Morocco a new arrangement or agreement 'to replace and recast in a form more properly adapted to

present circumstances the treaty bounds originally contracted with the State of Morocco.' (Rejoinder, p. 43.)

"The question in the present case is not whether the capitulatory régime is good or bad, but whether and to what extent it subsists on a legal basis in respect of United States nationals in Morocco. This is the issue raised in the first Submission of the French Government and the third Submission of the United States Government. In both Submissions the reference is to Morocco.

"The judgment of the Court is concerned with consular jurisdiction only in the French Zone.

"The Court holds that except for the limited consular jurisdiction aforesaid, the United States claim to such jurisdiction came to an end with the termination of the capitulatory rights and privileges of Great Britain in that Zone by virtue of the Anglo-French Convention of 1937. We cannot accept this view.

"By Article 10 of the Anglo-French Convention of 1937, the United Kingdom agreed that henceforth it could not invoke that Article or Article 20 (a most-favoured-nation clause) of the Anglo-Moroccan General Treaty of 1856 for the purpose of claiming the 'jurisdictional privileges accorded on the basis of existing treaties concluded by His Majesty the Sultan of Morocco and the United States of America'. Article 16 of the same Convention contains a similar provision referring to 'jurisdictional privileges enjoyed by the United States under treaties at present in force'. It mentions Article 20 of the General Treaty of 1856 and also Article 13, another most-favoured-nation clause. From these provisions it appears that in the opinion of the parties to the Convention, that is to say, in the opinion of the French Government and the British Government, the United States would continue to enjoy 'jurisdictional privileges', as of right, in Morocco, even after the Anglo-French Convention of 1937 came into force.

"After the signature of the Convention, the French Ambassador in Washington wrote to the Secretary of State on August 26, 1937: 'The United States enjoys in Morocco the capitulatory régime by virtue of the Treaty concluded between the two Powers on September 16, 1836.' He then referred to Article 25 of the Treaty of 1836 and continued: 'The above-mentioned Convention between the United States and Morocco not having been denounced, the United States continues to benefit by the capitulatory régime in Morocco. In fact, following the conclusion of the Franco-Britannic Agreement (of 1937), it remains today the last Power in a position to avail itself of that régime. In advising Your Excellency of the desire of my Government to conclude with the American Government an agreement which would put an end to this régime, I take the liberty of recalling to Your Excellency that during the Conference of Montreux, which ended the régime of the capitulations in Egypt, the representative of the American Government made declarations indicating the conciliatory spirit in which the American Government intended to settle this question. . . . These declarations have given my Government reason to think that, like the British Government, the American Government will be willing to consent to the abolition of the régime of capitulations in Morocco.'

"In the light of these statements, it seems clear that in 1937, the French Government regarded the United States as entitled to avail itself of the capitulatory régime even after the Anglo-French Convention of 1937. We concur in this view and consider that the 'jurisdictional privileges' referred to in Articles 10 and 16 of the Anglo-French Convention of 1937 can mean nothing else than full consular jurisdiction. According to those Articles, these jurisdictional privileges rested 'on

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the basis of existing treaties'. This brings us to the most important of these treaties, *viz.*, the Act of Algeciras.

"We regard the Act of Algeciras as so fundamental that 'every article and clause thereof must be observed and fulfilled with good faith'. These were the words addressed to the United States and its citizens by President Theodore Roosevelt when causing the Act to be made public in 1907. The importance of the Act and of the principles which it embodies has been acknowledged by all. We therefore consider that in interpreting the Act due effect must be given not only to its express provisions but also to the underlying implications which lend coherence and meaning to the express provisions. Otherwise the entire structure of the Act may be undermined. So far as the United States is concerned, none of its provisions have been abrogated or renounced.

"The Act of Algeciras is a great multilateral convention directly binding upon Morocco and the United States as well as the other signatory Powers. Its status in regard to the old bilateral treaties, as an independent and superior act, is formally expressed in its last Article 123. The scheme of rights and obligations which it established, whether expressly or by necessary implication, as between Morocco and the United States can not, therefore, be allowed to be impaired by any transactions concluded between any of the other signatories without the concurrence of both Morocco and the United States. This appears to us to be fundamental.

"At the date of the Act of Algeciras, all the foreign signatory States had acquired, by usage or by treaty and usage, full consular jurisdiction in Morocco. The system in its entirety had been well established for at least fifty years, as shown by the Anglo-Moroccan General Treaty of 1856. The Act adopted the system as it stood, and, far from seeking to end it or to modify it in any way, extended it to the new criminal prosecutions and civil suits that might arise under the Act. We need not enumerate all the articles of the Act in which this has been done, but shall mention only the salient ones. Article 29 extends the consular system to prosecutions for violations of the Regulations in Chapter II of the Act, and Articles 101 and 102 to those of the Regulations in Chapter V. Article 45 extends the system to actions instituted by the State Bank of Morocco against foreign nationals. The extent to which the capitulatory system, with all its implications, is embedded in the Act is indicated by the fact that when Great Britain renounced the system in the French Zone by the Convention of 1937, the effect was declared in the Protocol of Signature of the Convention to be 'to involve the renunciation by His Majesty the King of the right to rely upon' no less than seventy-eight articles out of the 123 articles of the Act.

"We consider that the Act has adopted the system. It was the natural thing to do at that date and it was an obvious inducement to the foreign signatory Powers not only to assent to all the laws and regulations made by or under the Act, but to uphold what was of paramount importance to the ruler of Morocco at that time, namely, 'the triple principle of the sovereignty and independence of H.M. the Sultan, the integrity of his domains and economic liberty without any inequality', which was declared in the Preamble of the Act to be the foundation of a new order.

"The consular system has been adopted in the Act, not so much by express provision as by necessary implication. It would have occurred to no one to do so except by implication, because the system was part of the established order at that time. To give effect to the bare provisions of the Act and ignore this basic implication in respect of all other

cases of the exercise of consular jurisdiction would result in curious anomalies. For example, it is admitted that actions against a United States national by the State Bank of Morocco must, under Article 45 of the Act, be brought before the United States consular court; but not any other civil action by a Moroccan or a foreigner. What is there peculiar to the Bank's actions that they and they alone should be tried by the consular court? Similarly, what is the special feature of prosecutions for breach of customs and arms regulations that they and they alone should be dealt with by the consular court under Chapters II and V of the Act? Furthermore, what is there peculiarly onerous about the taxes mentioned in Chapter IV of the Act that they and only they should be leviable from foreign nationals subject to the safeguards provided in that Chapter, while other and perhaps heavier taxes may be freely levied? It is difficult to find a satisfactory answer to these questions.

"It seems to us that if the Act of Algeciras is to be maintained as a logical and coherent structure, the full consular system embedded in it must be adopted.

"There is no danger that this adoption would confer upon the system any longer lease of life than it would otherwise have had. For, even without the Act, the system, being based *inter alia* upon long-established usage, which is only another name for agreement by conduct, can only be terminated in the way in which international agreements can be terminated; and its adoption in the Act makes no difference in this respect.

"We now come to the implications of another important multi-lateral treaty, the Convention of Madrid. Article 5 of the Convention makes special provision for the trial of civil suits against protégés commenced before protection is granted and against ex-protégés before protection is withdrawn; it also provides that the right of protection shall not be exercised towards protégés under prosecution for a crime before they have been tried by the authorities of the country or before their sentence has been executed. These provisions necessarily imply that civil suits and prosecutions against the protégés of any foreign Power that signed the Convention are normally to be tried by the consular courts of that Power; otherwise the Article, which prescribes special rules for pending cases, would be unintelligible. Amongst the protégés are not only Moorish subjects employed by the legation and the consular officers of the foreign Power, but also a certain number of Moorish factors, brokers, or agents employed by foreign merchants for their business affairs. Articles 1 and 10 of the Convention maintain the position of these factors, brokers and agents unchanged.

"The Convention is still in force, so far as the United States is concerned, so that United States protégés are still entitled to its benefits. If such is the position of United States protégés, who are Moroccan subjects, *a fortiori* must it be the position of United States nationals, who are in some cases their employers in business. This was the view of the French Government itself in 1905, as evidenced by a despatch dated August 21, 1905, addressed by the President of the French Cabinet to the French Diplomatic Representatives in London, Petrograd, Berlin, Rome, Vienna, Washington, Brussels, The Hague, Copenhagen, Stockholm and Lisbon.

'Our Minister at Tangier informs me that the Shereefian Government has imprisoned one of our Algerian subjects . . . and made known its intention to remove him from our jurisdiction.

'This fact is a violation of treaties.

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'All the Powers signatories with Morocco to the Madrid Convention of July 3, 1880, or having adhered to it, have an interest in the respect of the principles which are put in issue. By virtue of a rule recognized by this international instrument, Moroccan protégés are removed from Moroccan jurisdiction; *a fortiori* the foreigners, subjects of the Powers, must benefit of the same advantage.

'I would appreciate your indicating to the Government to which you are accredited the point of view of the Government of the [French] Republic. . . .' (Rejoinder, p. 34.)

"At the date of the Madrid Convention, the signatory Powers were, independently of the Convention, entitled to claim full consular jurisdiction for their nationals, and therefore it was not necessary to mention this right separately in the Convention itself. But even where the external sources of the right have ceased, the right continues to flow from the express provisions which have been inserted in the Convention itself in respect of protégés.

"The Court has rejected the contention of the United States Government basing its claim to consular jurisdiction and other capitulatory rights in Morocco on 'custom and usage'. The rejection appears to proceed on the ground that sufficient evidence has not been produced in support of the claim. We consider that the evidence available is sufficient.

"Usage is an established source of extraterritorial jurisdiction and has, for example, been enumerated as a lawful source in the Preamble to the British Foreign Jurisdiction Act, 1890, which recites that 'by treaty, capitulation, grant, usage, sufferance and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries'. Usage and sufferance are only different names for agreement by prolonged conduct, which may be no less binding than agreement by the written word. The full consular jurisdiction which the United States in fact exercises in Morocco to this day has been in existence for nearly a hundred years, if not longer; and during this long period both treaties and usage, in the broad sense of these terms, have contributed to the total result in varying measure. It is not possible, nor is it of any practical interest, at this distance of time, to isolate and assess separately the contribution made by each of these sources. Both were at work supplementing each other.

"The first treaty in which full consular jurisdiction was conceded by the ruler of Morocco to a foreign Power appears to be the Anglo-Moroccan General Treaty of 1856. It is admitted in the French Government's Reply to the Counter-Memorial of the United States Government that this Treaty incorporated existing usages, which necessarily implies that usage was at work even before 1856. It is true that the admission has been made for the purpose of contending that after incorporation the usages shared the fate of the Treaty, a contention with which we do not agree; nevertheless, there is the admission that the Treaty incorporated prior usage.

"Article XIV of that Treaty and Article XVI of the Treaty of 1861 between Morocco and Spain are, equally, evidence that usage was at work before, as well as during, the period of these two Treaties. These Articles provide that litigation between British subjects or Spanish subjects and other foreigners shall be decided solely in the tribunal of the foreign consuls without the interference of the Moorish Government 'according to the established usages which have *hitherto* been acted upon or may *hereafter* be arranged between such consuls', or 'could according to established forms, or according to those which may be agreed upon among the said consuls'. This shows that usage was

operating and was supplementing treaties both before and after 1856 and 1861.

"It is also significant that United States Congressional legislation has, ever since 1860, invested the consular courts in Morocco with jurisdiction in both criminal and civil matters 'so far as the same is allowed by treaty, and in accordance with the usages of the countries in their intercourse with the Franks or other Christian nations'. In other words, the United States has been openly relying on usage as one of the sources of its jurisdiction ever since 1860.

"Even after 1937, when, according to the French Government, the benefits of the capitulatory provisions of the Treaties of 1856 and 1861 were no longer available to the United States, the French Government has been transmitting Moroccan taxation and other laws to the United States Government in order to have them made applicable to United States nationals in the French Zone. The assent of the United States to taxation laws was sought in this way some twenty-three times in the period 1938-1948. This could only be on the ground that jurisdiction to enforce these laws against United States nationals lay with the United States consular courts.

"The conduct of the French Government was not due merely to what was described during the hearings as 'gracious tolerance'. As early as October 1937, the Secretary of State of the United States wrote as follows to the French Ambassador in Washington:

'I observe that in your Note [of August 26, 1937], reference is made to Article 25 of the American-Moroccan Treaty of September 16, 1836, which provides for the termination of the Treaty upon one year's notice given by either party. In order that there may be no misunderstanding, I think it is pertinent to point out that American capitulatory rights in Morocco are derived not only from the American-Moroccan Treaty of 1836, but also from other treaties, conventions, or agreements and confirmed by long-established custom and usage.'

"Thus the French Government knew in 1937 that the United States was asserting usage as at least one legal basis of its rights, and in spite of this knowledge, the French Government continued the old practice without any reservation. It was not, therefore, a case of 'mere gracious tolerance'. As we have shown, usage has been continuously at work, in varying measure, during a period of nearly a hundred years, if not longer, and, therefore, what has been happening since 1937 is evidence of a continuous process which began nearly a century before that date.

"It is significant that during the years 1914-1916, France negotiated a series of agreements with foreign States by which they renounced claiming their 'rights and privileges arising out of the régime of capitulations' in the French Zone. Some of these States, such as Switzerland, Greece and Japan, had never entered into treaty relations of any sort with Morocco. Only through usage could these States have acquired the rights which they undertook not to claim. The position of the United States can not be worse merely because it had treaties with Morocco containing most-favoured-nation clauses.

"It has often been said in the course of this case that the United States is now the only Power that has not renounced its capitulatory rights in Morocco. This is hardly accurate. The renunciation by Great Britain in the Anglo-French Convention of 1937 is confined to the French Zone; so too is the renunciation (such as it is) by Spain in the Franco-Spanish Declaration of 1914. Neither of these renunciations extends to the whole of Morocco which the United States still treats as a single

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country. Moreover, there are still 'French tribunals' in the French Zone and 'Spanish tribunals' in the Spanish Zone. These, it may be noted, are the names used in the Franco-Spanish Declaration of 1914. Technically, the French tribunals are not consular courts; but in fact they exercise, as part of their functions, the jurisdiction formerly exercised by the French consular courts. The United States is not therefore claiming a unique position. Such inequality as may appear to exist is the result, not of the claim of the United States, but of attempts to secure piecemeal renunciation, from each Signatory Power, of rights which had accrued to all of them equally through usage and treaties, particularly the Convention of Madrid and the Act of Algeciras. This appears to be admitted in the Memorial of the French Government:

'Moreover, in Morocco especially, the disappearance of capitulatory privileges in general had logically to result from *simultaneous* action by *all* foreign Powers. Otherwise, inequalities of status would have resulted which would have been in contradiction with the general contractual principles governing the international status of the Shereefian Empire.' (Memorial, p. 47.)

"Our conclusion, upon this part of the case, is that the third Submission of the Government of the United States, which relates to its jurisdictional privileges, must be accepted, even apart from the effect of the most-favoured-nation clauses in its Treaty of 1836 with Morocco.

"Fiscal Immunity"

"The right to tax necessarily implies the right to take coercive measures in case of non-payment. It follows from what we have said on the issue of consular jurisdiction that no coercive measures can be taken against the person or property of nationals of the United States except with the aid of the consular courts of the United States, which, in the ultimate analysis, means the assent of the United States. In this sense, and to this extent, therefore, they enjoy a general immunity from Moroccan taxation, apart from the effect of any most-favoured-nation clause.

"We need not repeat our arguments regarding consular jurisdiction based on the Convention of Madrid and the Act of Algeciras. But there are certain special provisions both in the Convention and the Act which relate to taxes on foreigners and to which we would invite attention.

"The Convention of Madrid provides for the levy of two taxes on foreigners, the agricultural tax and the gate tax. Article 12 deals with the agricultural tax and is in the following terms:

'Foreigners and protected persons who are the owners or tenants of cultivated land, as well as brokers engaged in agriculture, shall pay the agricultural tax. They shall send to their Consul annually, an exact statement of what they possess delivering into his hands the amount of the tax.

'He who shall make a false statement, shall be fined double the amount of the tax that he would regularly have been obliged to pay for the property not declared. In case of repeated offense this fine shall be doubled.

'The nature, method, date and apportionment of this tax shall form the subject of a special regulation between the Representatives of the Powers and the Minister of Foreign Affairs of His Shereefian Majesty.'

"Article 13 deals with the gate tax and runs thus:

'Foreigners, protected persons and brokers, owning beasts of burden shall pay what is called the gate-tax. The apportionment and the manner of collecting this tax which is paid alike by foreigners

and natives, shall likewise form the subject of a special regulation between the Representatives of the Powers and the Minister of Foreign Affairs of His Shereefian Majesty.

'The said tax shall not be increased without a new agreement with the Representatives of the Powers.'

"Chapter IV of the Act of Algeciras provided for the levy of some additional taxes from foreigners. In the case of every one of these new taxes, as in the case of those provided for in the Convention of Madrid, special safeguards are prescribed. The 'tertib' leviable under Article 59 is not to be applied to foreign subjects except under the conditions stipulated by the Regulations of the Diplomatic Body at Tangier on November 23, 1903. This Regulation provided, *inter alia*, that if a foreigner or protégé refused to pay the tax in time and coercive measures became necessary, these measures would be taken exclusively through the consular authorities. Safeguards are provided under Article 61 in respect of the building taxes; under Article 64 in respect of certain taxes on trades, industries, and professions; under Article 65 in respect of the stamp tax, the transfer tax on the sale of real estate, the statistical and weighing tax and the wharfage and lighthouse dues; under Article 70 in respect of harbour dues; under Article 71 in respect of customs-storage dues.

"We would invite particular attention to the second paragraph of Article 64:

'If as the result of the collection of such taxes from Moorish subjects the Diplomatic Body at Tangier should deem it advisable to extend the same to those under foreign jurisdiction, it is hereby specified that the said taxes shall be municipal.'

This should be read with Article 76, which implies that for the purposes of Article 64, the decision of even a majority of the Diplomatic Body would not suffice. Nothing could indicate more clearly that foreigners were not to be taxed except with the consent of their Government.

"So long as the provisions of the Convention of Madrid and the Act of Algeciras to which we have referred are in force, as they undoubtedly are in force so far as the United States is concerned, a general immunity follows from those provisions by necessary implication. For it would be meaningless to enumerate certain special taxes and provide safeguards for their levy from foreign nationals, if the rest of the whole field of taxation were left open. At the time of the Convention of Madrid and the Act of Algeciras, foreign nationals enjoyed a general immunity from taxes. Therefore, the taxes enumerated in these treaties were exceptions to a prevailing general rule and they must now be read as if the general rule were embodied in the treaties.

"Our conclusion on this subject is that United States nationals are entitled to a general immunity from taxes save those specifically recognized by the Convention of Madrid, the Act of Algeciras, and any other relevant treaty or agreement.

"We are consequently of opinion that the consumption taxes provided for in the Dahir of February 28, 1948, were wrongly levied from United States nationals up to August 15, 1950, the date on which the United States consented to these taxes. But we have not sufficient data upon which to base a conclusion as to the refund of the taxes already paid.

"Spanish Treaty of 1861

"In view of the preceding considerations, the United States need not, in our opinion, rely on the Spanish Treaty of 1861 as one of 'the existing treaties' of 'the treaties at present in force' referred to in

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Articles 10 and 16 of the Anglo-French Convention of 1937, from which the United States derives its broader consular jurisdiction and fiscal immunity. (Articles 5 and 16.)

"The United States having in its pleadings relied on this Treaty, the Court thought it necessary to adjudicate on the contention and reject it on the ground that the relevant part of the Treaty has been abrogated by the declarations of 1914 made by Spain and France on behalf of Morocco.

"In view of the fact that Spain was not represented before the Court during the hearings, we think it inadvisable to base any conclusion upon a definite finding that any part of the Treaty of 1861 with Spain has been abrogated or that it has not been abrogated. Without pronouncing any definite opinion one way or the other, we may point out that the abrogation of the Treaty is more than doubtful.

"Article 63 provides:

'It is agreed that after ten years have transpired from the day of the exchange of the ratifications of the present Treaty, either of the two contracting Parties shall have a right to demand the modification of the Treaty; but until such modification shall have taken place by mutual agreement, or a new treaty shall have been concluded and ratified, the present one shall continue in full force and vigour.'

"Neither the Convention of 1912 between France and Spain, nor the Declarations of March 7 and of November 14, 1914, seem to accomplish the modification of the Treaty by mutual agreement, since in neither of them did France purport to act on behalf of Morocco. The letter of the French Embassy of January 19, 1917, to the Department of State (see Annexes to Counter-Memorial, p. 277), referring to the Spanish rights mentioned in Article 1 of the Treaty of Fez, specifies expressly that they were defined 'by an agreement between the Governments, not of Morocco, but of France and Spain.'

"On the other hand, these agreements do not seem to stipulate any renunciation by either of the two Governments of its capitulatory rights in the other zone, in the way the United Kingdom renounced its own rights by the 1937 Convention. The difference between the formula adopted in the Declarations of 1914 and that of the 1937 Convention is not without significance. To renounce claiming a right may be nothing more than the suspension of the exercise of that right.

"The renunciation was made in view of the guarantees of judicial equality offered to foreigners by the French or Spanish tribunals respectively. It may therefore be considered as subject to a condition. In this case, each of the two Governments would be entitled to re-open the question of its rights in the event of the guarantees proving to be ineffective, or the tribunals ceasing to exist or being substantially modified, or in the event of a change in the political position of either of them.

"It has been contended that there is no difference between the two formulas, that the choice of the wording of the Declarations of 1914 is merely due to considerations of diplomatic convenience, and finally that it was the same formula which was used by France in more than twenty Declarations by which it obtained between 1914 and 1916 the renunciation of the Powers subscribing to these Declarations. It is asserted that France was entirely free to choose either of the two formulas, and that its choice must therefore be construed as evidence of their perfect equivalence.

"In fact, these twenty Declarations which are posterior to the Spanish Declaration, have simply followed the pattern of that Declaration. They would not, by themselves, impair any conclusion which may be drawn from the wording of their model.

"In these conditions, the most-favoured-nation clauses granted to the United States by the Treaty of 1836,¹ when applied to the Treaty of 1861, viewed in the light of the 1914 Declarations, may have the effect of extending to the United States all the rights and favours granted by that Treaty, notwithstanding the suspension of their exercise by Spain.

"It is recognized that the failure by a Power, to which a favour has been granted, to exercise that favour does not affect or prejudice the right of any other Power entitled to that favour by virtue of a most-favoured-nation clause. For all useful purposes, suspending the exercise of a favour is equivalent to failure to exercise it. Therefore, nothing would or should preclude the United States from exercising the capitulatory rights granted by the Treaty of 1861.

"This conclusion may be considered to be supported by a decision of July 12, 1924, delivered by the Court of Appeal of Rabat, the highest French judicial authority in Morocco (see Dalloz, *Recueil périodique*, 1925, Part II, p. 35).

"By this decision the Court granted an *exequatur* (executory title) for the execution of a judgment by one of the national Moroccan tribunals in a case relating to a matter of real property, a matter which had always been considered in the capitulatory régime to be within their exclusive jurisdiction. This régime had, however, developed an indirect control on the exercise of that jurisdiction, by subjecting the execution of such judgments to an *exequatur* to be granted by the consul.

"According to the decision of the Court of Rabat, this right for the consul derives from Article 5 of the Treaty of 1861 between Morocco and Spain and has been extended to all the other capitulatory Powers by virtue of the most-favoured-nation clause.

"In exercising that right in 1924, the Court must therefore have held that at that period both the French and Spanish Capitulations were still in force in the French Zone of Morocco. The Spanish Capitulations continued then to be a source of that right in that Zone, while the French Capitulations, by virtue of the most-favoured-nation clause, made it possible for the French Court of Rabat, successor of the French consular court, to receive and exercise that right.

"Article 95

"Both France and the United States agree that Article 95 of the Act of Algeiras defines the value on the basis of which the *ad valorem* duties of 12½ per cent. are to be liquidated. Each of them gives an interpretation of this provision, as regards imported goods, different from the other's and each disputes the other's interpretation.

"That the two Governments are justified in considering that Article 95 defines that value is borne out by Article 96, which, while setting up a committee on valuations, requires that committee to appraise the value of the chief articles of merchandise dutiable in the Moorish customs *under the conditions specified in the foregoing article*. Article 95 must therefore be considered to have laid down the definition of that value.

"Which, then, of the two interpretations is the correct one ?

¹ The most-favoured-nation clause in Article 24 of the Treaty of 1836 runs as follows: "... and it is further declared that whatever indulgence, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be equally entitled to them".

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" France interprets the value in question to be the local market value, while the United States interprets it to be the export value plus freight, insurance and similar expenses.

" Both methods of valuation have been and are known in Morocco as well as in other countries, either as exclusive or as combined methods. In Morocco, the local market value had been adopted by the German Treaty of 1890 (Article 2). The greater number of countries adopt, however, the other method of valuation. Sometimes, the local market value is adopted when the export or foreign market value can not be ascertained, or when it is desired to adopt protectionist measures or to conceal a higher customs duty under the guise of a moderate one.

" The point which concerns us here is what the framers of the Act of Algeciras intended to establish by Article 95, and how this provision was understood by the Moroccan authorities from 1906 to 1912 and has been understood by the Protectorate authorities since.

" In Article 95 two phrases are the subject of contention between the Parties. In the following sentence they are underlined [*sic*.]:

' The wholesale value of the merchandise *delivered in the custom-house and free from customs duties and storage dues.*'

" If the natural sense of these two phrases yields a coherent and reasonable proposition, then this proposition can only be set aside if sufficient evidence is adduced to prove that it could not have been contemplated.

" The first phrase refers to transportation of merchandise from the place of origin to the custom-house and thereby conveys an indication of the two elements of the value inseparably connected, *viz.*, export value and expenses of transportation.

" The second phrase describes, in the technical language of customs, an article of merchandise without or before the levy of customs dues. This description excludes any connection with local market value, since the latter includes customs dues and can only be used as a basis for valuation after these dues have been deducted. The usual expression in this case would be ' after deduction of customs duties ' (see below Treaty of Commerce of 1938 between the United Kingdom and Morocco, signed but not ratified).

" Both phrases, therefore, point to the export or foreign market value of country of origin plus freight and insurance.

" It is true that Article 95 applies to exports and imports, but this double function must imply that the terms employed refer equally to both operations. In fact, local market value for exports would correspond perfectly to market value of the country of origin.

" It must be noted that Article 95 does not provide for the whole procedure of valuation. To ascertain this procedure, Article 95 must be read in conjunction with Article 96. This last provision sets up a committee on customs valuations to appraise annually the chief articles of merchandise dutiable in the Moorish customs. This appraisal is, however, to be made *under the conditions specified in Article 95*. Article 96 does not prescribe the establishment of minimum and maximum values, but the schedule referred to in that Article has contained both, either to allow for the different qualities or for the different countries of origin of goods, or for any other reason.

" In any case, two methods of valuation have been adopted in the execution of the Act of Algeciras, one for the chief articles of merchandise and another for others. Both these methods have a common basis.

" In our view, this common basis is the market value of the country of origin. Any necessary guidance for verifying declared values is provided for by the Schedule of Values fixed under Article 96.

" This brings us to the provisions relating to declarations contained in Articles 82 to 86.

" Article 82 of the Act requires importers to file in the custom-house a declaration stating, *inter alia*, the value of the merchandise.

" Articles 83 to 86 provide penalties for inaccurate statements by the importer concerning the kind, quality or value of imported goods.

" As to value, Article 85 states that if the declaration should be found to be inaccurate as to the 'declared value' and the declarant should be unable to prove his good faith, certain results shall follow.

" Now it would be reasonable to suppose that had it been intended that the market value in Morocco should be the basis for determining the customs duty, there could have been little purpose in attaching such importance to a declaration by the importer.

" Moreover, the market value in Morocco would reflect many charges attaching to the goods after leaving the custom-house, such as transportation, warehousing, handling, commissions and other expenses incident to placing the goods on the market, and the profit realized by the importer and by any brokers or middlemen. Obviously, there is room for a wide difference between the local market value of goods and the value at the time of delivery to the custom-house. Local market values may fluctuate, depending upon the plenitude or scarcity of the goods at a given time.

" In conclusion, the text of Article 95 presents no ambiguity, unless we do violence to the word '*rendue*' to find therein a reference to the local market or to the word '*franche*' by making it synonymous with '*déduction faite*.'

" Assuming that the text is ambiguous, the examination of the *travaux préparatoires* might throw some light on its interpretation.

" The original draft (Article 19) submitted to the Conference of Algéciras provided:

' Les droits *ad valorem* seront liquidés et payés d'après la valeur en gros et au comptant de la marchandise au port de débarquement ou au bureau d'entrée s'il s'agit d'importation.'

[*Translation*]

' The *ad valorem* duties shall be liquidated and paid according to the wholesale value of the merchandise at the ports of landing, or at the bureau of entry, in the case of imports.'

" The provision contrasts with that in the older treaties, especially the Treaty between Morocco and Germany (1890). It does not make the *market value* either of the port of landing or the bureau of entry the basis of liquidation of customs duties. The reference to the port or to the bureau relates simply to the destination of the merchandise and is clearly made with a view to including the expenses incurred in transporting the merchandise up to the port or to the bureau. This reference naturally implies the adoption of the market value of the country of origin.

" To this draft an amendment was proposed by the delegate of Great Britain at the eighth sitting of the Conference and was accepted.

" It simply replaced 'at the port of landing or at the bureau of entry, in the case of imports,' by the words '*au bureau de douane et franche des droits le douane*' ([*Translation*])—'At the custom-house and free from customs duties'.) Later, at the fifteenth sitting, the German

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and British delegates deposited amendments, not to Article 19 but to Article 20, which has become Article 96 of the Act of Algeciras.

" The German amendment reads as follows:

" [*Translation*]

' The duties *ad valorem* levied in Morocco on imports shall be calculated on the value which the imported article has in the place of loading or buying, increased by expenses for transportation and insurance to the port of unloading in Morocco.

' In order to fix for a specified period the value in the port of entry of the more important articles which are taxed, the Moroccan Customs administration will invite the principal merchants interested in the import trade to proceed in agreement with it, to the establishment of a tariff for a period not to exceed twelve months. The tariff so established shall be communicated by the Moroccan Customs to the Diplomatic Body and shall at the same time be officially published.

' It will be considered officially recognized so far as concerns the products of the ressortissants of signatory States, in so far as no member of the Diplomatic Body will have formally opposed it during the two weeks which will follow the official publication and the communication addressed to the Diplomatic Body.'

" The amendment not only provides for a procedure for establishing a tariff for a specified period, which was the subject-matter of the provisions of the original Article 20, but takes up again the question of fixation of value, which had already been decided at the eighth sitting.

" This amendment raised the objection of the French delegate, not as regards the method of fixation of value, which no one opposed, but as regards the composition of the body or commission for the establishment of the tariff. The two amendments were referred to the Drafting Committee, which adopted a text based on the British amendment to the same Article (Article 20). Therefore, all that can be said in respect of the first paragraph of the German amendment is that it was not maintained by the Drafting Committee. But the reason for this lies in the fact that the question raised in that paragraph had already been adopted as Article 19, which has become Article 95. It can not then be said that it has been rejected on the ground that it stated a rule which the Conference was unwilling to adopt. In fact, it repeated in more detailed form the purport of the British proposal presented at the eighth sitting.

" In short, the German amendment was not adopted, not because it was controverted on the point with which we are now concerned, but because of its other unsatisfactory features.

" In the final draft, Articles 19 and 20 of the draft of Customs regulations (which became in the final Act of Algeciras Articles 95 and 96) were slightly modified, the first by the addition of the word '*rendue*' before the words '*au bureau*' and the second by the addition of the phrase '*dans les conditions spécifiées à l'article précédent*', thus linking the two provisions.

* * * * *

" As regards the practice followed in the period subsequent to the Act of Algeciras, the evidence resulting from the documents filed by the Parties is in favour of the interpretation put forward by the United States in respect of the measures adopted during the period of 1908-1912. It is even decisive in respect of the period following the Protectorate up to 1928. The letter of 1912 of M. Luret, the chief representative in Morocco of French bondholders in control of the Moroccan

Customs Administration,¹ as well as the Regulations published by the Customs Administration in 1928,² relevant extracts of which are reproduced below, can leave no doubt in this respect.

" However, since 1930 a new policy of valuation based, more or less, on the local market value has been asserted by draft regulations prepared by the Protectorate authorities. They have given rise to protests from various foreign Powers and bodies. As evidenced by the documents filed by the Parties, the same policy was equally asserted in the proceedings of the Committee on valuation instituted by Article 50 of the Statute of Tangiers to replace that provided for by Article 96 of the Act of Algeciras. It gave rise to conflicting attitudes by the member representing the International Zone of Tangiers and the two other members representing the French and Spanish Zones. The two sides sustained the two interpretations put forward in the present instance, without the issue being settled in one way or the other. The Committee had no authority to decide the issue, but the concrete decisions on valuation were generally taken by a majority vote of the French and Spanish members.

" This part of the history of Article 95, revealed by the documents filed at the end of the oral proceedings, brings no contribution to the interpretation of that provision. It merely shows that the conflict goes as far back as 1930. However, a document referred to in the annexes of the Counter-Memorial throws great light on this matter of interpretation. It is the Treaty of Commerce of 1938 between Morocco and the United Kingdom, signed but not ratified. It had been communicated to the United States in order to be considered with the 1937 Anglo-French Convention as models for a double convention of the same nature between Morocco and the United States (Annexes to Counter-Memorial, p. 322).

" There was an exchange of Notes between the French and British Governments at the time of the signature of the Convention on July 18, 1938. In its Note (No. 5) of that date, the British Government states

¹ Following a complaint from the American Minister concerning customs duties assessed against imports of the Vacuum Oil Company, he wrote to the American Minister that the Company had failed to furnish the *original invoices* which could be checked against quotations on the *market of origin* and defined the dutiable value of imported merchandise under Article 95 of the Act of Algeciras thus: [*Translation*]

' This value comprises the purchase price of the petroleum f.o.b. New York increased by all expenses subsequent to the purchase, such as outgoing dues paid at foreign custom-houses, transportation, packing, freight, insurance, manipulation, landing, et cetera, in a word, everything that contributes to constitute, at the moment of presentation at the custom-house, the cash wholesale value of the product, on the basis of which, according to Article 95 of the Act of Algeciras, the duties must be paid.' (Translation; quoted in the Note dated November 13, 1947, from the American Consul General at Casablanca to the Diplomatic Counsellor of the French Residency; Annex 59.)

² [*Translation*] (81) Merchandise taxed on value:

By the terms of Article 95 of the Act of Algeciras, the duties *ad valorem* are liquidated according to the cash wholesale value of the merchandise delivered to the custom-house and free from customs duties and storage fees. The value of this merchandise for the application of the tariff is consequently that which it has in the place and at the moment it is presented for payment of duties. It comprises, therefore, in addition to the purchase price in the foreign country, the expenses following the purchase such as the export duties paid to foreign customs, the transportation or freight, insurance, expenses for unloading, in a word all which contributes to form upon arrival in Morocco the wholesale value of the merchandise (excepting customs duties and storage fees), that is the current price of the merchandise in the place where the customs duties are assessed.

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that it has been informed by the French Government that the provisions contained in Chapter V of the Act of Algeciras (which includes Article 95) are, in the opinion of that Government, incompatible with modern conditions and that the said Government have communicated to it certain provisions which they intend to incorporate in the customs legislation. It also states that the Government of the United Kingdom are prepared to give their consent to the *abrogation* of the provisions contained in the said Chapter. A new text is annexed to this Note which is intended to be substituted for the provision of Article 95 and which sets out the view now put forward by France. (*Command* 5823 (1938), pp. 49-54.)

"All this shows that the view now put forward by France as an interpretation of Article 95 was described by France and the United Kingdom in 1938 as an abrogation of that Article.

"Accordingly we find that, in applying Article 95 of the Act of Algeciras, the only value to be taken account of is the value in the country of origin plus expenses incident to transportation to the custom-house in Morocco."

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Jurisdiction—Confiscatory Decrees of Recognized Government—Extra-territorial Operation of—Whether Validity may be Questioned in Courts of Another Country—Winding-up of Dissolved Corporations' Assets Situated Abroad—Attempt to Prove Debts in Liquidation—*Situs* of Debt—Effect of Dissolution Decrees on Foreign Corporation—Whether it may be Notionally Revived by Subsequent Winding-up—Services Rendered after Dissolution.

Re BANQUE DES MARCHANDS DE MOSCOU (KROUPETSCHESKY).
ROYAL EXCHANGE ASSURANCE *v.* THE LIQUIDATOR.
WILENKIN *v.* THE LIQUIDATOR.

England, High Court of Justice, Chancery Division.
(Vaisey J.)

February 28, 1952.

THE FACTS.—The Banque des Marchands de Moscou, which formerly had its head office in Moscow, and a branch office in Petrograd, but no branch office in England, was dissolved, according to Russian law, on or about December 14, 1917, by a Decree of that date of the Soviet Government by which the Bank, in common with other banks, was nationalized, its assets and liabilities being taken over by the State Bank. On May 30, 1932, a winding-up order was made in England in respect of the Bank.

The Royal Exchange Assurance Company sought to prove, in the liquidation of the Bank in England, in respect of the equivalent in sterling (at the rate of exchange current on December 14, 1917) of (a) a sum of roubles 1,332,992 which, in December 1917, stood to the credit of a current account with the Bank in the name of the Company; (b) a sum of roubles

4,500,000 which, in December 1917, stood to the credit of a deposit account in their name; (c) a sum in respect of interest on the latter account; and (d) the value of bonds, shares and other securities deposited with the Bank for safe custody by the Company (as a customer) in Petrograd. The liquidator rejected the proof and the Company appealed.

Between March 1930 and the date of the winding-up order in May 1932, Wilenkin, an expert in Russian law, assisted in various legal proceedings relating to the Bank, and, largely owing to his advice in regard to a claim by the Deutsche Bank, that claim was defeated. Wilenkin now claimed in the winding-up of the Bank for his expenses and remuneration.

Held: I. With regard to the claim of the Royal Assurance Company—

(i) The proper law of the contract between the Company and the Bank was Russian law, and thus the Company's claims, which were against the Bank in Russia, were regulated by Russian law; the effect of the Russian decree of nationalization had been to extinguish the rights of the Company against the Bank, so that at the date of the winding-up order in England, there was no subsisting debt or liability owed by the Bank to the Company.

(ii) The Soviet State having taken possession of the securities deposited by the Company with the Bank, the Bank would be entitled to claim that it had been evicted by title paramount, whereby the liability was discharged.

II. With regard to the claim by Wilenkin—Although for the purposes of winding-up the Bank it was necessary notionally to revivify it (notwithstanding its dissolution in Russian law), it could not be regarded as having been in existence at the time of Wilenkin's services, and therefore Wilenkin could not be regarded as having rendered services to the Bank for which he could claim in the winding-up.

Vaisey J., after stating the details of the Company's claim, continued:

“ Counsel for the liquidator has submitted to me that there is a very short and simple answer to this claim, and that answer rests, putting it broadly, on a principle which was laid down by Maugham, J., in *Re Russian Bank for Foreign Trade* ([1933] Ch. 745; 102 L.J.Ch. 309; 149 L.T. 65; Digest Supp.). The principle was laid down in clear terms, although it might be that in that case it was only said by way of dictum. Put shortly, the point which the liquidator takes on this proof is that these claims all relate to a debt or a liability which was owing or accrued in Russia, and the position of the Royal Exchange Assurance in this regard is no different in quality

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from the position of any other customer or debtor of the bank in Russia. It is not, and cannot be, I think, disputed that according to our law the debt is situate where the debtor is, and I do not think it can be disputed that these claims have to be regulated by Russian law and English law does not come into this matter at all. What is submitted on behalf of the liquidator is that here we have a debt or obligation that, undoubtedly, did exist prior to the legislation in Russia, which has been called confiscatory and which has, perhaps not unfairly, been so regarded, and that there were subsisting debts and obligations of the bank to its customers, including the present claimants. It is said that that is all very well, but although the Russian legislation, by reason of its confiscatory character, has no extraterritorial effect, it is completely binding so far as concerns things which belong to the debtor and are referable to Russian territory, and here we have a debt or a claim, the remedy for which at the material date—that is to say, at the date when the confiscatory legislation took effect—was a debt which was liable to be discharged in Russia and nowhere else. The Royal Exchange Assurance, it is said, stands in no different position from any Russian customer or creditor of the bank, and the claims of the Royal Exchange Assurance and every other claim in Russia having regard to matters that have taken place in Russian territory have been effectively dealt with by the legislation to which I have referred.

“ In *Re Russian Bank for Foreign Trade* (*ibid.*) Maugham J. lays down that, among other things, the Soviet decrees in question—the confiscatory decrees which nationalized banks and transferred their assets and liabilities elsewhere—could not have the effect of extinguishing or transferring debts regarded in English law as being locally situate in England, but from that it follows inevitably, as I think, that the decrees did have that effect in regard to debts and obligations which in English law are regarded as being locally situate, not in England, but in Russia. The learned Judge put it in this way ([1933] Ch. 766):

‘ There is, however, a real question in dispute, and that is whether the debt to the petitioner was or was not locally situate in Russia at the date of the decrees of 1917 and 1918 above referred to. If it was locally situate in Russia, it seems to me that as the effect of the legislation the debt is no longer due by the bank as a corporation, and that the only claim of the petitioner is against the Soviet State. By the decree of December 1917, the assets and liabilities of the bank within Soviet territory were taken over by the People’s Bank, and this in my opinion involves the destruction of the original debt and a kind of statutory novation (in some sense, perhaps, only a theoretical one) whereby the State Bank became liable to discharge it. This legislation

must be taken to be effective as regards property situate in the territory of the Soviet Republic (see *Princess Paley Olga v. Weisz* ([1929] 1 K.B. 718; 98 L.J.K.B. 465; 141 L.T. 207; Digest Supp.) in which it was held that the English Courts will not inquire into the legality of acts done by a recognized foreign Government against or in relation to its own subjects in respect of property situate in its own territory. It seems to me to be clear that the same principle must apply, whether the property consists of chattels or of a debt regarded in this country as having a local situation. If, then, it were to be established that the debt of the petitioner was represented by a credit to him in the Archangel branch of the bank, I should be of opinion that that debt had ceased to exist . . . If the debt was primarily recoverable in London, I am of opinion that it was not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalization decrees. Its locality must be taken to be the place where the debt was in the ordinary course recoverable . . . The decrees in question could not according to our laws have the effect of extinguishing the debt, if locally situate here, or of transferring it to the Soviet Republic.'

"After referring to *The Jupiter No. 3* ([1927] P. 250; 97 L.J. P. 33; 137 L.T. 333; Digest Supp.), the learned Judge said (*ibid.*, 767):

'Moreover, it is evident that our Courts have never entertained the view that a debt incurred here by a foreign corporation permitted to carry on business here under English law can be discharged by a foreign statute . . . It may be observed that the decrees of the Russian legislature in relation to insurance companies were on the same lines as those in relation to private banking companies at any rate to this extent, that the insurance businesses in Russia were nationalized so that the assets of such companies, so far as Russian statutes could effect such a result, were transferred to the Russian State. In the Court of Appeal, Sargant L.J., in his judgment [in *Sedgwick, Collins & Co. v. Rossia Insurance Co. of Petrograd* [1926] 1 K.B. 1; 95 L.J.K.B. 7; 133 L.T. 808; *affd.* H.L., *sub nom. Employers' Liability Assurance Corp'n. v. Sedgwick, Collins & Co.* [1927] A.C. 95; 95 L.J.K.B. 1015; 136 L.T. 72; Digest Supp.] observed as follows ([1926] 1 K.B. 15): "Nor do I think that the position of creditors here as against property of the Rossia Insurance Company here, such as debts owing to them from debtors in this country, is altered by legislation or decrees of the Russian sovereign power which 'nationalized' the undertaking and assets of the Rossia Insurance Company".'

"I agree that those statements are *obiter*, but they seem to me to be founded on accurate principles, and they seem to me to govern the present case.

"Other authorities were cited to me, for instance, *Aksionairnoye Obschestvo A.M. Luther v. James Sagor & Co.* ([1921]

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3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 11 Digest 309, 17) where it was held that, as the Government of this country had recognized the Soviet Government as the *de facto* Government of Russia, the validity of the decree there in question, which was not the same decree as that with which we are now concerned, could not be impugned. In the judgment of Scrutton L.J. the matter is put thus ([1921] 3 K.B. 558):

‘ But it appears a serious breach of international comity, if a State is recognized as a sovereign independent State, to postulate that its legislation is “ contrary to essential principles of justice and morality ”. Such an allegation might well with a susceptible foreign Government become a *casus belli*; and should in my view be the action of the sovereign through his ministers, and not of the judges in reference to a State which their sovereign has recognized. The English Courts act on the rule “ that an intention to take away the property of a subject without giving him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms ”: *Central Control Board (Liquor Traffic) v. Cannon Brewery Co., Ltd.* ([1919] A.C. 744; 88 L.J.Ch. 464; 121 L.T. 361; 83 J.P. 261; 11 Digest 548, 512). If it were they must give effect to it, and can hardly be more rigid in their dealings with foreign legislation. Individuals must contribute to the welfare of the State, and at present British citizens who may contribute to the State more than half their income in income tax and super tax, and a large proportion of their capital in death duties, can hardly declare a foreign State immoral which considers (though we may think wrongly) that to vest individual property in the State as representing all the citizens is the best form of proprietary right. I do not feel able to come to the conclusion that the legislation of a State recognized by my sovereign as an independent sovereign State is so contrary to moral principle that the judges ought not to recognize it. The responsibility for recognition or non-recognition with the consequences of each rests on the political advisers of the sovereign and not on the judges.’

“ Then there is the case, to which allusion has already been made, *Princess Paley Olga v. Weisz* ([1929] 1 K.B. 718; 98 L.J.K.B. 465; 141 L.T. 207; Digest Supp.). It is sufficient if I read the headnote, which is:

‘ The English Courts will not inquire into the validity of acts done by a recognized foreign Government against its own subjects in respect of property situate in its own territory.’

“ Pausing there, it seems to me to be equally true that it will not inquire into the validity of acts so done against persons who dealt with it within its own territory. The headnote goes on:

‘ In 1918 a section of Russian revolutionaries took and retained possession of movables in Russia belonging to the

plaintiff against her will. The act of those revolutionaries was subsequently adopted by the Soviet Republic, which was recognized in 1924 by the British Government as the *de jure* Government of Russia. In 1928 the movables in question were sold in Russia by the Soviet Republic to the defendants, who brought them to England. In an action by the plaintiff to recover those movables or damages for their detention or conversion:—Held, that the action failed, as the Court could not inquire into the validity of the acts of a foreign sovereign Power which had been recognized by the Government of this country.’

“It is perfectly clear that these Courts do not recognize acts of that character which are done with respect to property which is within their jurisdiction, as, for instance, the assets of a company in this country, but that is not the case here. We are here dealing with a matter which, both in regard to the property in question, *i.e.*, these debts and claims, and in regard to the proper forum for their liquidation and satisfaction, is entirely Russian. It seems to me that on those principles the claim of the Royal Exchange Assurance must fail.

“I might, perhaps, refer to a recent decision of Devlin J. in *Bank Voor Handel en Scheepvaart v. Slatford* ([1951] 2 All E.R. 779), where it was held that

‘(i) foreign legislation purporting to have effect over property within the territory of the United Kingdom would not be recognized by the English Courts, it being immaterial (a) whether or not the legislation was confiscatory, and (b) that it was the legislation of an allied Government made with the purpose of keeping property out of the hands of a common enemy; the question whether foreign legislation should, in particular circumstances, be recognized on the ground of public policy was a matter, not for the Courts, but for the legislature. . . .’

. . . and, therefore, it was held that a decree of the Netherlands Government was ineffective to transfer certain gold and bank balances to that Government and that they could be and were rightly vested in the Custodian of Enemy Property.

“Counsel for the applicants admitted that, if the case was governed by the principle laid down by Maugham J. in *Re Russian Bank for Foreign Trade* ([1933] Ch. 745; 102 L.J.Ch. 309; 149 L.T. 65; Digest Supp.), the claim of his client must necessarily fail. I think it does fail, and I think that it fails on that comparatively short and simple ground. It seems to me that the claim of the Royal Exchange Assurance is governed by Russian law. I think that that was the proper law of the contract between those claimants and the bank. I think that that claim can be and could have been discharged according to the provisions, and, I think, only according to the provisions of

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Russian law, and that the rights and remedies of the claimants were all put an end to by one or other of the decrees applicable in this case."

His Lordship then examined the relevant parts of the Decrees, and continued:

"If those decrees take effect, and, I think, it must be assumed they have for this purpose taken effect, I think there is no longer, and there was not at the date of the winding-up, any subsisting debt owing from the Bank to the claimants on which this proof could be founded. It is no business of mine to criticise the decrees or to express any view as to their propriety if, I think, as I do think, that they were wholly effective and must be assumed in these Courts to have been fully effective, and I think that when the winding-up order was made the debt and the obligation on which this claim is founded had ceased to exist, either at the end of 1917 or the beginning of 1918, it matters not which.

"The proof as originally delivered has been rejected. The amended proof, which, I suppose, is still before the liquidator, must also, in my opinion, be rejected. Though one feels some sympathy with the applicants, after all they took a risk in trading in a foreign country in the manner in which they did, and I do not see that anything can be done about it in this winding-up. The result is that as regards the first of these two summonses the claim fails.

"There is one further point. As regards the securities which were deposited with the Bank, not as security but merely for safe custody, there was the further point, which, I think, is a good point, that a bailee of goods who has been evicted by title paramount has no longer any liability under the bailment. That is, I think, established by *Ross v. Edwards & Co.* ((1895), 73 L.T. 100; 3 Digest 102, 288) in the Privy Council, to which the headnote is:

'In ordinary circumstances a bailee is estopped from disputing the title of the bailor; but, if there is an eviction by title paramount, the bailee is, in the absence of any special contract, discharged from all liability.'

"In delivering the judgment of the Privy Council, Lord Macnaghten said (73 L.T. 101):

'It is clear that the bailee after acknowledging that he holds the goods on account of the bailor cannot say to the bailor: "The goods are not yours"; but it is equally clear that if there is that which amounts to eviction by title paramount the bailee is discharged from his promise. In that event he is under no liability to the bailor unless he has made a special contract with him or is in some way to blame for his loss.'

"Whatever may have been the value of this fund at the

relevant or any other date, there is no doubt, I think, that these two decrees of the Soviet Government have evicted the Bank in the sense that the State has taken possession of these securities and thereby enabled the Bank to plead and allege that they have in fact been evicted by title paramount. I think that, so far as concerns the claim to the securities or the value of them as distinguished from the claim in respect of the two accounts, the current and deposit accounts, that decision in the light of those decrees affords a ground upon which the liquidator is bound to reject the claim as regards the value of these particular securities.

“The other claim is by Mr. Wilenkin, who is an expert in Russian law, and who has, undoubtedly, in the course of this extremely varied and tortuous litigation concerning the Bank, rendered good services which have been a great deal of help. I have now to look at the way in which his claim is formulated. It rests on this. He says that between March, 1930, and the date of the winding-up order in May, 1932, he rendered such services to the Bank or the liquidator, or those interested in the Bank or the winding-up, as entitled him as of right to claim against the assets in the winding-up for those services. I say at once, that there may be no doubt about it, that, if this claim is sustainable, the amount for which Mr. Wilenkin seeks reimbursement, *viz.*, £850, is regarded by the liquidator as in itself fair and reasonable. There is no doubt that, but for his intervention and activities, the Deutsche Bank, in circumstances which I need not describe in detail, might have got away with a judgment for a very large sum of money against these assets. The matter was carried to the Court of Appeal, where it was held that the claim could not be sustained, and, indeed, that the whole of the proceedings under which that judgment had been obtained was bad from beginning to end. Unless that appeal had been brought—and it is admitted that it was brought largely at the instigation and under the auspices of the present claimant—the Deutsche Bank would have obtained a judgment, to which as matters turned out, it had no shadow of right. Therefore, there is no doubt that Mr. Wilenkin has contributed something to the winding-up and to the rights of those interested in the winding-up, for which *prima facie* he ought to receive payment.”

His Lordship then examined the details of the claim, and continued:

“What was the position when those alleged services were rendered? I say, ‘alleged’, because the difficulty is, to whom were those services rendered? At that time the winding-up order had not been made, and the difficulty is to discover to exactly what extent during that interim period (*i.e.*, in the

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period between the dissolution of the Bank in Russia and the date of the winding-up order in England) the Bank was in existence from the point of view of our law. There is no doubt that to some extent a company, such as the Bank, which is being wound-up is deemed for some purposes to have been in existence before the winding-up order was made, but not for all purposes, and it is only hypothetically revived or re-constituted in regard to that interim period, that is to say, before the winding-up order was made, for the limited purpose of enabling the winding-up order to be carried into effect. I cannot find any authority that after the winding-up order has been made one has to look at the past history and put the wraith of the company back into existence, enjoying activities and subjecting itself to obligations just as if it had never been dissolved. In all the various statements that have been made as to how far the company notionally exists, I cannot find any statement which justifies me in saying that it exists for the purpose of employing agents for straightening out its affairs, and so forth, during that period when it is completely dead, subject only to such measure of revivification as must be deemed to have arisen through the making of the winding-up order. It seems to me that if I were to hold that the company was, so to speak, hypothetically revived *ex post facto* (if I may coin a phrase which is both hybrid and unsatisfactory) there is no limit to the amount of revivification which must be attributed to a company in the situation which I have been trying to describe.

"I think that Mr. Wilenkin's activities may have been very useful and may have produced a very satisfactory result, but I cannot see that on any ground they could have been provided to the company, which was dissolved, or to the liquidator, who was not appointed, or to the people who were interested in the equity, if there was an equity, in this Bank. One is driven back to this strange notion of an agency of necessity. But an agent has first to have a principal. Where in this case is the principal? I cannot find one. The only ground on which this claim could be allowed would be if I decided as a matter of law that this company, for the purpose of Mr. Wilenkin's activity, was in existence and was in fact employing Mr. Wilenkin in and about its business and actions. It seems to me that these metaphysical conceptions are extremely difficult, and when there is a hypothesis on a hypothesis such as I have when it is said that the non-existent company was none the less deemed to be employing a non-appointed agent to conduct its non-existent affairs, one gets into a maze of metaphysics (if that is the right word) from which there is no logical escape. The whole thing seems to me to

be far too subtle and complicated to convince anybody that one could adopt it as a ground for admitting such a claim as the present.

"There is no doubt that when the Bank was dissolved in Russia it was dissolved for all purposes, and that during the interregnum, *i.e.*, before its partial revivification by the making of the winding-up order, it could neither sue nor be sued. That, I think, is quite clear on the authorities. So far as there were any assets which ought to have belonged to it if it had not been dissolved, if I may put it in that hypothetical way, I take it that those would have become vested in the Crown as *bona vacantia*, and that the Crown's title, no doubt, was defeasible. There is no suggestion that Mr. Wilenkin can be deemed to have been acting as agent, either of necessity or otherwise, for the Crown. I cannot see that the making of the winding-up order on any of the authorities can be held to have had the effect of validating things that were done for the benefit of the Bank while it was, so to speak, in the grave. I find the greatest difficulty in formulating a way in which this claim can be put. It has been said in these Courts that the principle relating to agents of necessity ought not to be extended. I think it would be extending it very much if I were to extend the doctrine of agency of necessity to agency on behalf of a non-existent person. I cannot see my way to do that. It is true that the liquidator might have thought it proper to make some sort of *ex gratia* or compassionate grant to Mr. Wilenkin for any expenses to which he had been put, but to say that Mr. Wilenkin has some sort of right in the winding-up which he can enforce by putting in and establishing a proof seems to me to go beyond anything which the principles, as I understand them, can possibly justify."

His Lordship then cited the judgment of Scrutton L.J. in *Jebara v. Ottoman Bank*, [1927] 2 K.B. 254, concerning the difficulty of accepting the notion of "agent of necessity" in English law.

[Report: [1952] 1 All E.R. 1269.]

PART IV

THE INDIVIDUAL IN
INTERNATIONAL LAW

A—IN GENERAL

I.—Position of Individuals in International Law.
Human Rights and Freedoms

[See also Part I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; and Part VIII, TREATIES: IX, Operation and Enforcement of Treaties.]

Case
No. 53

Individual in International Law—Human Rights and Freedoms—Charter of the United Nations—Aliens—Effect of United Nations Charter on Aliens' Rights to Own Real Property—Treaties—When Self-Executing—Question of Self-Executing Provisions of the United Nations Charter.

FUJII v. STATE OF CALIFORNIA.

United States, Supreme Court of California, in Bank.

April 17, 1952.

THE FACTS.—The plaintiff, an alien Japanese ineligible for citizenship under American law, appealed from a judgment declaring that certain land purchased by him in 1948 had escheated to the State, pursuant to the alien land law of California which provided that land purchased by an alien ineligible for citizenship shall, in the absence of contrary treaty provision, escheat to the State. The District Court of Appeal held the alien land law to be contrary to the letter and spirit of the United Nations Charter and accordingly unenforceable.¹ The sole question presented on this appeal was the validity of the land law.

Held: that the decision below that the alien land law was unenforceable must be affirmed, because that law was violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. With respect to the effect of the United Nations Charter upon the validity of the alien land law, the Court said:

“ It is first contended that the land law has been invalidated and superseded by the provisions of the United Nations Charter pledging the member nations to promote the observance

¹ See *Fujii v. State of California*, 217 P. 2d 481 (1950), 218 P. 2d 595 (1950).

of human rights and fundamental freedoms without distinction as to race. Plaintiff relies on statements in the preamble and in Articles 1, 55 and 56 of the Charter, 59 Stat. 1035.¹

"It is not disputed that the charter is a treaty, and our federal Constitution provides that treaties made under the authority of the United States are part of the supreme law of the land and that the judges in every state are bound thereby. U.S.Const., Article VI. A treaty, however, does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing. In the words of Chief Justice Marshall: A treaty is 'to be regarded in courts of justice as equivalent to an act of the Legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court.' *Foster v. Neilson*, 1829, 2 Pet. 253, 324, 7 L.Ed. 415.²

"In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by

¹ The preamble recites that "We the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights . . . and for these ends . . . to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims."

Article 1 states that: "The Purposes of the United Nations are . . . 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; . . ."

Articles 55 and 56 appear in Chapter IX, entitled "International Economic and Social Cooperation." Article 55 provides: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote

"(a) higher standards of living, full employment, and conditions of economic and social progress and development;

"(b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

"(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Article 56 provides: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."

² In *Foster v. Neilson*, certain treaty provisions were held not to be self-executing on the basis of construction of the English version of the document. Subsequently, upon consideration of the Spanish version, the provisions in question were held to be self-executing. *United States v. Percheman*, 7 Pet. 51, 8 L.Ed. 604. Chief Justice Marshall's language in the *Foster* case, however, has been quoted with approval in later cases. *United States v. Rauscher*, 119 U.S. 407, 417-418, 7 S.Ct. 234, 239-240, 30 L.Ed. 425; *Valentine v. United States*, 299 U.S. 5, 10, 57 S.Ct. 100, 103, 81 L.Ed. 5.

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the language of the instrument, and, if the instrument is uncertain, recourse may be had to the circumstances surrounding its execution. See *Foster v. Neilson*, 2 Pet. 253, 310-316, 7 L.Ed. 415; *United States v. Percheman*, 7 Pet. 51, 58-59, 8 L.Ed. 604; *Jones v. Meehan*, 175 U.S. 1, 10-23, 20 S.Ct. 1, 5-10, 44 L.Ed. 49; *Chew Heong v. United States*, 112 U.S. 536, 539-543, 5 S.Ct. 255, 256-258, 28 L.Ed. 770; *Cook v. United States*, 288 U.S. 102, 119, 53 S.Ct. 305, 311, 77 L.Ed. 641; cf. *Nielsen v. Johnson*, 279 U.S. 47, 52, 49 S.Ct. 223, 224, 73 L.Ed. 607. In order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts. See *Head Money Cases* [*Edye v. Robertson*] 112 U.S. 580, 598, 5 S.Ct. 247, 254, 28 L.Ed. 798; *Whitney v. Robertson*, 124 U.S. 190, 194, 8 S.Ct. 456, 458, 31 L.Ed. 386; *Cook v. United States*, 288 U.S. 102, 118-119, 53 S.Ct. 305, 311, 77 L.Ed. 641; *Valentine v. United States*, 299 U.S. 5, 10, 57 S.Ct. 100, 103, 81 L.Ed. 5; *Bacardi Corp. v. Domenech*, 311 U.S. 150, 161, 61 S.Ct. 219, 225, 85 L.Ed. 98.

"It is clear that the provisions of the preamble and of Article 1 of the charter which are claimed to be in conflict with the alien land law are not self-executing. They state general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons. It is equally clear that none of the other provisions relied on by plaintiff is self-executing. Article 55 declares that the United Nations 'shall promote: . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,' and in Article 56, the member nations 'pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.' Although the member nations have obligated themselves to co-operate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.

"The language used in Articles 55 and 56 is not the type customarily employed in treaties which have been held to be self-executing and to create rights and duties in individuals. For example, the treaty involved in *Clark v. Allen*, 331 U.S. 503, 507-508, 67 S.Ct. 1431, 1434, 91 L.Ed. 1633, relating to

the rights of a national of one country to inherit real property located in another country, specifically provided that 'such national shall be allowed a term of three years in which to sell the [property] . . . and withdraw the proceeds . . . ' free from any discriminatory taxation. See, also, *Hauenstein v. Lynham*, 100 U.S. 483, 488-490, 25 L.Ed. 628. In *Nielsen v. Johnson*, 279 U.S. 47, 50, 49 S.Ct. 223, 73 L.Ed. 607, the provision treated as being self-executing was equally definite. There each of the signatory parties agreed that 'no higher or other duties, charges, or taxes of any kind, shall be levied' by one country on removal of property therefrom by citizens of the other country 'than are or shall be payable in each State, upon the same, when removed by a citizen or subject of such State respectively.' In other instances treaty provisions were enforced without implementing legislation where they prescribed in detail the rules governing rights and obligations of individuals or specifically provided that citizens of one nation shall have the same rights while in the other country as are enjoyed by that country's own citizens. *Bacardi Corp. v. Domenech*,¹ 311 U.S. 150, 158-159, 61 S.Ct. 219, 224, 85 L.Ed. 98; *Asakura v. City of Seattle*, 265 U.S. 332, 340, 44 S.Ct. 515, 516, 68 L.Ed. 1041; see *Maiorano v. Baltimore & Ohio R. Co.*, 213 U.S. 268, 273-274, 29 S.Ct. 424, 425-426, 53 L.Ed. 792; *Chew Heong v. United States*, 112 U.S. 536, 541-542, 5 S.Ct. 255, 257, 28 L.Ed. 770.

"It is significant to note that when the framers of the charter intended to make certain provisions effective without the aid of implementing legislation they employed language which is clear and definite and manifests that intention. For example, Article 104 provides: 'The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.' Article 105 provides: '1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes. 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.' In *Curran v. City of New York*, 191 Misc. 229, 77 N.Y.S. 2d 206, 212, these Articles were treated as being self-executory. See, also, *Balfour, Guthrie & Co. v. United States*, D.C., 90 F.Supp. 831, 832.

¹ It should be noted, however, that the treaty involved in the *Bacardi* case also contained a specific provision, not discussed by the Court, that its terms "shall have the force of law in those States in which international treaties possess that character, as soon as they are ratified by their constitutional organs". 311 U.S. 150, 159, 61 S.Ct. 219, 224, 85 L.Ed. 98.

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"The provisions in the charter pledging co-operation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification. Instead, they are framed as a promise of future action by the member nations. Secretary of State Stettinius, Chairman of the United States delegation at the San Francisco Conference where the charter was drafted, stated in his report to President Truman that Article 56 'pledges the various countries to co-operate with the organization by joint and separate action in the achievement of the economic and social objectives of the organization without infringing upon their right to order their national affairs according to their own best ability, in their own way, and in accordance with their own political and economic institutions and processes.' Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State, Department of State Publication 2349, Conference Series 71, p. 115; Hearings before the Committee on Foreign Relations, United States Senate [Revised] July 9-13, 1945, p. 106. The same view was repeatedly expressed by delegates of other nations in the debates attending the drafting of Article 56. See U.N.C.I.O. Doc. 699, 11/3/40, May 30, 1945, pp. 1-3; U.N.C.I.O. Doc. 684, 11/3/38, May 29, 1945, p. 4; Kelsen, *The Law of the United Nations* [1950], footnote 9, pp. 100-102.

"The humane and enlightened objectives of the United Nations charter are, of course, entitled to respectful consideration by the courts and Legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities. The charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs. We are satisfied, however, that the charter provisions relied on by plaintiff were not intended to supersede existing domestic legislation, and we cannot hold that they operate to invalidate the alien land law."

[Report: 38 Cal. 2d 718, 242 P. 2d 617.]

NOTE.—This case is noted in *American Journal of International Law*, 46 (1952), pp. 559, 682, *Intramural Law Review of the University of California*, (1953), p. 49, *Michigan Law Review*, 51 (1953), p. 742, *New York University Law Review*, 27 (1952), p. 858, *Rocky Mountain Law Review*, 25 (1952), p. 184, *Temple Law Quarterly*, 26 (1952), p. 184, and *University of Pennsylvania Law Review*, 100 (1952), p. 1247.

Individual in International Law—Right to Sue a State Party to a Treaty.

See Case No. 34 (*Boon and Chantiers Navals du Rupel v. State of the Netherlands*).

B.—NATIONALITY**I.—In General. Proof of Nationality**

Nationality—Proof of—Registration as Alien—Whether Conclusive as to Nationality—The Law of Siam.

**Case
No. 54**

In re LIM.

Thailand, Supreme Court. October 31, 1952.

(Chamroon Netisart, Manupan Wimolsarn, Nonta Pracha.)

THE FACTS.—The petitioner asked the Court to pronounce upon his nationality under the Nationality Acts. The petitioner's father had previously applied for a Certificate of Alien Registration on the petitioner's behalf, stating that the petitioner was born in China and was therefore a Chinese. A Certificate of Alien Registration was issued on account of this statement. The petitioner now asked the Court to rectify what he considered to have been a mistake, and to cancel the Certificate of Alien Registration by ordering that the petitioner was a Thai national. The Civil Court dismissed the petition on the ground that the rights of the petitioner were not being disputed. The dismissal was reaffirmed by the Court of Appeal.

Held: that the appeal must be dismissed. The Court said:

"The question of nationality is to be decided by the law of the State whose nationality is in question, or is being disputed or claimed. In the present case, this is the law of Thailand concerning nationality. If the petitioner was in fact a Thai national, the fact that the authorities had issued a Certificate of Alien Registration could not and would not deprive him of his Thai nationality (in the absence of any contrary provisions).¹ The registration of aliens is only a pragmatic and not conclusive evidence that the registered persons were aliens. Their true nationality is governed by the law regarding nationality, without necessarily involving any judicial pronouncement.

¹ This case is of significance in view of subsequent legislation, in particular Article 5 of the Nationality Act, 1953 (No. II), depriving such persons of Thai nationality by regarding the taking out of a Certificate of Alien Registration as an act of renunciation. See S.Ct.R. 1212/2497; S.Ct.R. 1460/2497.

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This is not a case of 'exercising judicial rights' within the scope of Article 55 [of the Code of Civil Procedure].¹ "

[Report: S.Ct.D., 1317/2495.]

Nationality—British Commonwealth of Nations—Effect of British Nationality Act, 1948, and Citizenship Acts of the Dominions—Those who may Claim the Status of British Subject—The Law of Ceylon.

See Case No. 17 (*Sudali Andy Asary v. van den Dreesen*).

II.—Acquisition of Nationality. Nationality as Affected by Changes of Sovereignty

Case
No. 55

Nationality—Effect of State Succession on—Transfer of Sovereignty of Former Dutch East Indies to Republic of the United States of Indonesia—Dual Nationality—Choice of Law.

In re B.

Holland, District Court of The Hague. May 26, 1952.

THE FACTS.—This case concerned a minor who was born in the Netherlands Indies of Belgian parents domiciled there. Under a Netherlands Law of February 10, 1910 (*Staatsblad*, No. 55), she had the status of a "Netherlands subject" (not being a Netherlander proper). She retained that status until the transfer of sovereignty from the Netherlands to the Republic of the United States of Indonesia in December 1949, when, under Articles 5 and 9 of the Netherlands-Indonesian Convention of December 27, 1949, which dealt with the status of citizens resulting from the transfer,² all "Netherlands subjects" of foreign origin acquired Indonesian citizenship unless they opted against it. By birth, however, the minor was also a Belgian subject, because her father possessed Belgian

¹ See n. 1 in *Pua v. Ministry of the Interior* (1953), S.Ct.R. 1477/2496.

² Article 5 of the Netherlands-Indonesian Convention of 1949 provides as follows:

"Persons who immediately before the transfer of sovereignty are of age [Article 9 makes this provision directly applicable also to minors] and are Netherlands subjects of foreign origin—non-Netherlanders—and who were born in Indonesia or reside in the Republic of the United States of Indonesia shall acquire Indonesian nationality but may, within the time limit therefor stipulated, opt against Indonesian nationality; . . . if, immediately before the transfer of sovereignty, such persons possessed already another nationality, they shall, when opting against Indonesian nationality, regain Netherlands nationality only on an express request to that effect made by them."

In the case under consideration an explicit rejection of the (purely nominal) Indonesian nationality was evidently not considered worthwhile, so that the minor formally acquired Indonesian nationality. Cf. also *In re Andries (Franchise Case)*: *International Law Reports*, 1950, Case No. 26.

nationality. She therefore had dual nationality. Under these conditions, the question was whether Belgian or Indonesian law governed the appointment of a guardian. The provisions of the Convention of 1949 conflicted with Article 1 of the Hague Convention of June 12, 1902, concerning Conflicts of Laws in matters of Guardianship, to which both the Netherlands and Belgium were parties, and under which the Netherlands courts were obliged in a case of this kind to apply Belgian law.

Held: that Belgian law must be applied. The fact that the minor had acquired Indonesian nationality as a consequence of the transfer of sovereignty did not mean that Indonesian law applied. The obligations under the Convention of 1902 of the Netherlands to Belgium could not be reduced by a later Convention between the Netherlands and Indonesia concerning the status of their respective citizens.

[Report: *N.J.*, 1952, No. 759.]

Nationality—Acquisition of—Compulsory Grant of—Annexation of Foreign Territory Accompanied by Compulsory Grant of Nationality—Annexation of Czechoslovakia and Grant of German Nationality to “Ethnic Germans”—Whether such Persons Retained German Nationality after Recovery of Territory by Czechoslovakia. **Case No. 56**

GERMAN NATIONALITY (ANNEXATION OF CZECHOSLOVAKIA)
CASE.

German Federal Republic, Federal Constitutional Court.
May 28, 1952.

THE FACTS: The appellant was the subject of extradition proceedings in Germany, but as German law does not permit the extradition of German nationals, the question of the appellant's nationality had to be determined before the request for his extradition could be considered on the merits. The appellant, an Austrian national by origin, acquired Czechoslovak nationality in 1920 when the town in the province of Bohemia/Moravia where he was then living became part of the newly-established Republic of Czechoslovakia. On March 16, 1939, the German Reich annexed the Czechoslovak province of Bohemia/Moravia, and on April 20, 1939, the then German Government enacted an Ordinance by virtue of which it conferred German nationality on all so-called “ethnic Germans”, including the appellant. After the end of hostilities in the Second World War Bohemia/Moravia again became part of the Republic of Czechoslovakia, and shortly thereafter the appellant left Czechoslovakia and established his domicile

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in Germany. The question referred to the Federal Constitutional Court in the present case was whether the appellant, notwithstanding that the annexation of Bohemia/Moravia by Germany in 1939 was admittedly contrary to international law, had nevertheless retained the German nationality compulsorily conferred upon him by the Ordinance of April 20, 1939. On behalf of the Bavarian Ministry of Justice (which was concerned in the extradition proceedings) it was contended that the appellant had never validly acquired German nationality, on the ground that the compulsory grant of a nationality in violation of international law is devoid of legal effect. On behalf of the appellant it was contended that there was no rule of international law which precluded the acquisition of the nationality of an annexing State by the inhabitants of an annexed State, and that the question as to whether he was a German national was one to be determined exclusively by German law, and that according to German law he had become a German national in 1939 and had never lost that nationality.

Held: (i) that the illegality of the annexation of Czechoslovakia by Germany did not result in the invalidity of the compulsory grant of German nationality to so-called ethnic Germans domiciled in Czechoslovakia;

(ii) that, in the absence of any rule of international law governing the acquisition of the nationality of an annexing State by the inhabitants of an annexed State, the question of the appellant's nationality had to be determined in accordance with German law;

(iii) that according to German law the appellant had become a German national in 1939, that he still retained his German nationality, and that accordingly he was not liable to be extradited.

The Court said: "We agree with the Bavarian Ministry of Justice that the occupation of parts of the Czechoslovak Republic by German troops was contrary to international law. We cannot, however, agree with the conclusions which the Ministry draws from this premiss with regard to the acquisition and loss of the nationality of the appellant. We must base ourselves on the principle of international law that, as a rule, every State is entitled to provide in its own discretion how its nationality shall be acquired and lost. This discretion is circumscribed by the general rules of international law according to which a State may confer its nationality only upon persons who have some close factual connection with it. The practice of States and the jurisprudence of arbitral tribunals recognize, *inter alia*, descent from a national or birth in the territory of a State as a close connection of this kind. Within

a State a nationality can be effective by virtue of the law of that State as long as it has not been contested by a foreign State or withdrawn at the request of the latter. . . . Therefore it is primarily German law which determines the validity within Germany of a rule governing the law of nationality. Neither Article 4 of the Weimar Constitution nor Article 25 of the Basic Law¹ [Constitution of the Federal Republic] justifies the conclusion that the Decree of March 16, 1939, and the Ordinance of April 20, 1939, are invalid. International law does not contain any general rules concerning change of nationality in connection with territorial changes (State succession). The practice of States varies. Nor do the powers reserved by the law of the Occupying Powers preclude the continued application of the Decree of March 16, 1939, and the Ordinance of April 20, 1939. . . . The invalidity of the annexations undertaken by the German Reich after January 1, 1938, does not, having regard to all the surrounding circumstances, justify the conclusion that all compulsory grants of German nationality which took place in connection with these annexations must be regarded as null and void. This view is strengthened by the fact that the legislation of the German Reich concerning German nationality has been recognized indirectly even outside Germany since the end of hostilities. The Republic of Czechoslovakia deprived of their Czechoslovak nationality with retroactive effect all Czechoslovak citizens of German origin who had automatically acquired German nationality after September 29, 1938. The United Kingdom of Great Britain and Northern Ireland has made similar provisions in dealing with the problem of German property situate in foreign countries. Thus, the Distribution of German Enemy Property Act, 1949, does not regard as a German national any person who acquired German nationality by reason of the inclusion in the German State after March 1, 1938, of any territory not comprised therein on that day. The fact that December 31, 1937, has been taken as the crucial date can, therefore, only be taken to mean that all compulsory naturalizations after that date which were connected with acts of annexation must be regarded as invalid in so far as the persons affected thereby are being claimed as nationals by the States whose territories have been annexed. Where they have not been so claimed, German law need not regard them as non-Germans if they have always—since the date of the collapse of the Reich in 1945—manifested a desire to be treated as German nationals. The recognition of this desire also provides a firm basis in international law for the recognition of the German nationality

¹ These Articles provide that the general rules of international law shall form part of the law of the land.

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of all persons of German origin who were compulsorily naturalized. Accordingly, the appellant lost his Czechoslovak nationality according to the law of Czechoslovakia with effect from June 16, 1939. His German nationality has remained unaffected because now, as before, he claims that nationality."

[Reports: JZ, 7 (1952), p. 414; NJW, 5 (1952), p. 777.]

**Case
No. 57**

Nationality—Acquisition of—Effect of Annexation of Territory—Purported Annexation of Occupied Territory—Effect on Nationality of Non-Residents—Italian Occupation of Lubiana—Effect of Treaty of Peace.

KOZUH v. UFF. STATO CIVILE DI MILANO.

Italy, Court of Appeals of Milan. March 18, 1952.

THE FACTS.—The question involved in this case was that of the national status of one Kozuh, who had been born in the province of Lubiana (Yugoslavia) but had become permanently settled in Italy even prior to the purported annexation of Lubiana by Italy during the Second World War. Article 20 of the Treaty of Peace with Italy, 1947, provides:

"Within a period of one year from the coming into force of the present Treaty, Italian citizens over eighteen years of age (or married persons whether under or over that age), whose customary language is one of the Yugoslav languages (Serb, Croat or Slovene), and who are domiciled on Italian Territory may, upon filing a request with a Yugoslav diplomatic or consular representative in Italy, acquire Yugoslav nationality if the Yugoslav authorities accept their request.

"In such cases the Yugoslav Government will communicate to the Italian Government through the diplomatic channel lists of the persons who have thus acquired Yugoslav nationality. The persons mentioned in such lists will lose their Italian nationality on the date of such official communication."

It was contended that Kozuh could not be within the scope of these provisions because, not having been resident in the province concerned at the time of its purported annexation, he could not have acquired Italian nationality as a result of that measure. Alternatively, it was argued that the annexation could have had no effect upon nationality because of its irregularity in terms of international law. These contentions were accepted by the Court of first instance despite the argument advanced on behalf of Kozuh that the legislative provision made by Italy with respect to the population of the annexed territory operated to invest with Italian nationality all persons "belonging to" the territory concerned. On appeal,

Held: that the judgment of the Court below must be reversed. The Court below had been wrong in holding that Kozuh did not "belong to" the province of Lubiana because he was resident elsewhere in Italy at the time of the pretended annexation. The purported annexation, although internationally illicit, was not a nullity and had involved the extension of Italian citizenship to the population "belonging" thereto. The provisions of the Treaty of Peace were not to be interpreted as implying the contrary. The Court said:

"The Court must examine closely whether Kozuh effectively acquired Italian nationality and whether he has retained that status. The matter, the Court below concluded, was not confined to the exploration of the doubt whether his lack of residence in the territory annexed prevented his acquisition of Italian nationality. It involved also various aspects of the question of the international legal significance of the annexation to Italy of the province of Lubiana. But it was unnecessary to consider whether the declaration of annexation produced any change of nationality. For such change can come about only as a result of a change in the sovereignty over the territory concerned. And sovereignty over territory in belligerent occupation passes to the Occupant only if the latter, having brought the war to a victorious conclusion, avails himself of his lawful power of consolidating his possession in definitive fashion or, alternatively pursuant to the stipulations of a treaty.

"If this were the case, there would exist no foundation at all for Kozuh's action. Therefore, it is necessary to consider first that aspect of the matter which the appellant seeks to dispose of by affirming that the act of annexation was internationally valid because the situation as it existed in Yugoslavia in 1941 is to be regarded as a true instance of *debellatio*. The Court has difficulty in accepting this view because, even after the setting up of the State of Croatia and the annexation of a large part of the remaining territory by Italy and the other belligerent Powers, there still survived in a part of the country, roughly corresponding to the former State of Serbia, to which the authority of the Occupants had not been extended, a remnant of Yugoslav governmental organization, capable of extension upon the termination of the occupation. The Court is equally unable to accept the appellant's argument which would admit the reconstitution of the Serbian State but maintain that Yugoslavia had been extinguished as a federal State formed by the union of the three Slav races. For the fact that the authority of the Occupying Powers was not extended to the area of the former Serbian State does not imply that the latter was in fact reconstituted; nor would this be a logical conclusion even assuming that the Occupying Powers had ultimately won the

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war. Moreover, the transformation of the institutions and constitutional form of Yugoslavia which has occurred does not imply that the old State has been extinguished and a new one created.

"The thesis that territorial annexations made in time of war are of no international legal effect is not universally denied. One school maintains that the legal relation between a State and its territory can only be destroyed by an act of will on the part of that State or as a result of the extinction of its personality (*debellatio*). An opposite view is that an internationally relevant authority is conceded 'to a subject of international law which establishes in definitive fashion its power over the territory of another even where the acts which have brought such a situation about may be characterized as internationally illicit because they are in breach of international law'. It is, however, easy to perceive the weakness of this last theory, which makes the author of the annexation the judge of the 'establishment in definitive fashion' of his authority, since, so long as the war continues, any establishment of this character is excluded by the uncertainty of the outcome. Still, even granting this, the drawing of a distinction between the unlawfulness of the act and the international recognition of its effects does not involve that the international order will remain indifferent to the consummation of the illegality and that its author has no international responsibility therefor. All that is implied is that a result following from an illegal act is not necessarily itself a nullity. But even if it be not entirely acceptable, this theory has the merit of drawing attention to the circumstance that the consequences flowing from illegal acts may have significance in law as facts. However, this, in the view of the Court, arises not as a result of a species of international recognition, which would ill accord with the unlawful character of the act, but results rather from the co-ordinate structure of the international community and its lack of any superior organ capable of that automatic annulment of the illegal consequences of the act which the Court below regards as produced by the defeat. It can, therefore, be taken to be clear that, in so far as concerns relationships not immediately annulled upon the return of the territory and its inhabitants to Yugoslav sovereignty, the international position prejudiced by the annexation is restored only by a collective transaction, *i.e.*, a treaty or a unilateral act which is duly recognized.

"It is not impossible that Kozuh immediately regained Yugoslav citizenship as a result of his possession of the four species of contact with the territory concerned to which reference has been made: what is important to ascertain is whether such reacquisition is balanced by the loss of Italian citizenship.

“ And, as to this, it may be pointed out that the international legitimacy or otherwise of the act of annexation is immaterial from the point of view of municipal law. Given the principle of the mutual exclusiveness of international law and municipal law, whatever the evaluation of that act in the international sphere, that evaluation cannot exclude any of the internal consequences of the proclamation of the annexation of the province of Lubiana to Italy. And, failing any contrary provision in the annexation law, it cannot be doubted that the intention of the State was to take over the inhabitants with the territory. This is made wholly clear by the provision for the conferment of Italian citizenship upon the population.

“ There does not seem to be room for any doubt, such as the Judge of first instance felt, that Kozuh could not have acquired Italian citizenship by reason of his not residing in the territory concerned.

“ The annexation did not bring about the automatic substitution of Italian law for that previously in force, as is made clear by the fact that provision was made for a distinct legal system, taking account of the ethnic characteristics of the population. What happened was that the legal order in force in the annexed territory was adopted and maintained in operation. As a result, there came into play the conception of a person as ‘ belonging to ’ that territory, a conception well described by the appellant in his argument and definable as a legal connection between an individual and his place of origin, existing and enduring independently of his presence there.

“ Kozuh, since he ‘ belonged to ’ the district of Lubiana within the meaning of this concept, thus acquired Italian citizenship as a result of the annexation.

“ This is not the place to investigate whether, as a result of the international illegitimacy of the act of annexation, he has at all times retained his Yugoslav citizenship, though the Court inclines to that view. In any event, as has been indicated already, he was reinvested with that citizenship upon the return to Yugoslav sovereignty of the territory and population which were formerly incorporated into the Italian State. But, as has also been pointed out already, that re-investment does not involve the automatic loss of Italian citizenship, given the principle of the mutual exclusiveness of the international and municipal legal orders and failing any specific provision in the Treaty of Peace resolving any conflict between Italian and Yugoslav law with respect to the condition of individuals who, having acquired Italian citizenship as a result of the annexation, should have become permanently resident in another province of Italy before the restoration—in the instant case, even before the annexation.

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"Two theoretical objections to the result the Court has thus reached—the inconvenience of dual citizenship and the danger of attributing decisive importance to the mere fact of residence in Italy—may be easily dismissed. It may be an ideal that every individual should have one citizenship only. But the phenomenon of dual citizenship nevertheless occurs, and occurs frequently enough to impel States to adopt uniform rules for the regulation of conflicts of nationality. The attribution of dual citizenship to an individual is, moreover, a lesser ill than the imposition upon him of citizenship by operation of law, independently of his wishes in the matter. There is, indeed, a tendency to prefer to the 'defensive principle', which political exigencies of recent times has conjured up—see the Draft Law of Italian Citizenship of 1930—the opposite principle that nationality is essentially a voluntary relationship. And the latter principle is unfavourable to dual citizenship. But it is superior only in that it accords recognition to the effective and substantial connection between an individual and a given community.

"There is no danger that a person will be forced to retain a nationality he does not wish to keep by reason only of his place of residence, in view of the option provided for in Article 20 of the Treaty of Peace. The Court below correctly stated the intention underlying this Article but neglected to bear in mind that a treaty may be the source not only of reciprocal obligations but also of rules regulating multiple relationships, as must follow from the equality of States and the co-ordinate nature of their legislative jurisdiction. When the normative content of a treaty is looked to, the paramount consideration is not so much to ascertain what the parties intended, as to extract rules applicable to the actual problems for the solution of which it was sought to provide. In an exactly similar situation the Permanent Court of International Justice laid down the principle that, in determining the nature and scope of a measure, it must look to its practical effect rather than to the predominant motive that might be conjectured to have inspired it. . . ."¹

[Report: *Foro Padano*, 1952, p. 554.]

¹ Advisory Opinion No. 13, *Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employer*: P.C.I.J., Series B, No. 13, p. 19; *Annual Digest*, 1925–1926, Case No. 298.

Nationality—Effect of Belligerent Occupation—Effect of Class “C” Mandate—Person Born in German New Guinea. **Case No. 58**

WONG MAN ON *v.* THE COMMONWEALTH.

Australia, High Court. June 6, 1952.
(Fullagar J.).

THE FACTS.—The plaintiff was born in 1916 of Chinese parents in what is now the Trust Territory of New Guinea. Before 1914 New Guinea was part of the German Empire. In September 1914, Australian forces, acting at the request of the United Kingdom, occupied German possessions in the area. A League of Nations Mandate in respect of the territory, with Australia as the mandatory power, entered into force in December 1920.¹

The plaintiff entered Australia during the Second World War, and the present action arose out of attempts to deport him under the authority of the War-Time Refugees Act, 1949,² which provided, *inter alia*, that “every person who entered Australia during the period of hostilities and is an alien” may be ordered to be deported. The plaintiff admitted that he entered Australia during the period of hostilities, but denied he was an alien, claiming to have been born “within His Majesty’s dominions and allegiance”.

Held: that the plaintiff was an alien. Military occupation does not alter the nationality of the inhabitants of the occupied territory; neither did the creation of a Class “C” Mandate give the inhabitants of the Mandate the nationality of the mandatory. The Court said:

“The Act contains no definition of the word ‘alien’. Throughout the argument before me it was assumed that the word means a person who is not a British subject, and I think that the question in the present case is whether the plaintiff is or is not a British subject. . . . That question must be determined by reference to the Nationality Act, 1920–1946.³ . . . Since the plaintiff claims to be a British subject by reason of the place of his birth, it is section 6 (1) (a) of the Nationality Act⁴ that is material. That provides that ‘The following persons shall be deemed to be natural-born British subjects, namely:— (a) Any person born within His Majesty’s dominions and allegiance’. . . . The question which emerges for decision

¹ A Trusteeship Agreement in respect of the territory was approved by the General Assembly on December 13, 1946: *United Nations Treaty Series*, Vol. 8, p. 181.

² Commonwealth Acts, 1949, No. 32.

³ Commonwealth Acts, 1920, No. 48, as subsequently amended.

⁴ Commonwealth Acts, 1920, No. 48.

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in this case is thus seen to be whether the plaintiff is a person who was 'born within His Majesty's dominions and allegiance'.

"There is a well-settled distinction between annexation or cession or subjugation on the one hand and mere military conquest and occupation on the other hand. It is not necessary, for present purposes, to examine the correct use of the terms 'cession', 'annexation' and 'subjugation'. It is enough to say that each is used to describe a formal and permanent acquisition, or a means of formal and permanent acquisition, of territory by one belligerent power from another. Such a permanent acquisition may, and often does, affect the nationality of all or some of the inhabitants of the territory acquired, though it does not necessarily do so, and a variety of questions may arise. . . . But, while permanent acquisition by cession or otherwise may affect nationality, mere military conquest and occupation of particular enemy territory in the course of a war never does. On such occupation no change takes place in the nationality of any of the inhabitants, and persons born during the occupation do not *ipso facto* become nationals of the occupying country. The reason, of course, is that military conquest and occupation without more does not involve a change of sovereignty; territory conquered and occupied by British forces during the course of a war does not automatically become part of the King's dominions.

"That in 1914 no more than mere military occupation was either intended or effected seems to me to be made abundantly clear by the cablegram from London to the Governor-General, by the terms of Colonel Holmes's¹ proclamation, by terms of capitulation and by the nature of the military administration in fact established. I am clearly of opinion that the plaintiff is not a person who was 'born within His Majesty's dominions and allegiance'. And it appears to me equally clear that nothing happened later to make him a British subject.

"Article 119 of the Treaty of Peace with Germany, which was signed at Versailles on June 28, 1919, provided that 'Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions'. It is seen that there was no cession to Great Britain. Later there was conferred upon the Commonwealth of Australia, in pursuance of the Covenant of the League of Nations, a Mandate in respect of German New Guinea and certain other former German territories in the Western Pacific. The New Guinea Act 1920-1935 (Cth)² came into force by proclamation on May 9, 1921. It recited the conquest and continued occupation by the Commonwealth of German New

¹ Officer Commanding Australian Occupation Forces.

² Commonwealth Acts, 1920, No. 25, as subsequently amended.

Guinea, the Treaty of Peace, and an agreement by the Principal Allied and Associated Powers that a mandate should be conferred upon the Commonwealth. It also recited that a mandate was to be issued to the Commonwealth in respect of German New Guinea 'with full power to administer the same, subject to the terms of the Mandate, as an integral part of the Territory of the Commonwealth'.

"The novel character of the mandatory system inevitably gave rise to many problems and much discussion among international jurists, but one point on which there seems to have been unanimity—or something nearly approaching unanimity—is that a Territory the subject of a 'C' mandate does not become part of the dominions of the mandatory. In *Frost v. Stevenson* (1937), 58 C.L.R., at p. 552, Latham C.J. said:—'The Treaty of Peace, read as a whole, avoids cession of territory to the mandatory, and, in the absence of definite evidence to the contrary, it must, I think, be taken that New Guinea has not become part of the dominions of the Crown'. . . . I regard the question as really concluded for me by *Frost v. Stevenson*."

[Report: 86 C.L.R. 125.]

NOTE.—This case is discussed by O'Connell in *British Year Book of International Law*, 31 (1954), p. 458.

Nationality—Effect of Change of Sovereignty—Dual Nationality—Option.

See Case No. 55 (*In re B.*).

VI.—Expatriation. Loss of Nationality

Nationality—Loss of Nationality—Expatriation by Voting in Foreign Country—Legal Position of States under Military Occupation—Sovereignty of Occupied Germany. **Case No. 59**

ACHESON, SECRETARY OF STATE *v.* WOHLMUTH.

United States, Court of Appeals, District of Columbia Circuit.
April 24, 1952.

THE FACTS.—Plaintiff-appellee, a United States citizen by birth, married a German national in 1926 and lived with her husband in Germany until 1947, when she applied for an American passport. Her application was refused, on the ground that, in 1946, she had expatriated herself under the Nationality Act of 1940, by casting her ballot in a German *Land* election. From summary judgment in her favour, the Secretary of State appealed.

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Held: that the judgment below must be reversed, but the plaintiff-appellee be given an opportunity to amend her complaint in order to support allegations that she was entrapped into voting or voted under duress. The Court said:

"The first matter to be considered is whether Germany, or more especially its American Occupied Zone, is to be regarded as a 'foreign state' within the meaning of the Nationality Act.¹ We are satisfied that it is. When the Nationality Act was passed in 1940, Germany was very clearly as much a foreign state as any other European sovereignty. Later events have not altered that fact. The state of war, followed by the victory of the Allies, the destruction of the Nazi régime, and the occupation by the United States of a portion of Germany—none of these had the effect of rendering Germany or any of its parts less 'foreign' than previously. Occupation by our troops does not make conquered territory a part of the United States or mean that such territory 'ceased to be a foreign country, in the sense in which these words are used in the acts of Congress.' *Fleming v. Page*, 9 How. 603, 50 U.S. 603, 13 L.Ed. 276. Such a view accords with the attitude to which this country adheres, that war should not be conducted for purposes of conquest. It also comports with the accepted rule of the law of nations that occupied territory is to be administered for the protection of the inhabitants and the occupying force; occupation should not be used as a device for transferring sovereignty. Oppenheim, *International Law* § 166 (6th ed. 1944); IV Hackworth, *Digest of International Law* § 587 (1943).

"Whether Germany in 1946 was a 'state' in the fullest sense of that word, or in the sense in which the term is used in international law generally, is an inquiry we need not here pursue.² The determinative question is whether it remained a state within the meaning of the Nationality Act of 1940. Thus we inquire, not whether Germany was *sui juris* among the nations of the world, but whether it was a polity capable of commanding an allegiance inconsistent with allegiance to the United States. Impairment of Germany's status in the international community, uncertainty as to its boundaries, and

¹ Section 401 (e) of the Nationality Act of 1940, 54 Stat. 1168-69, 8 U.S.C.A. §801 (e), provides:

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

"(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory . . ."

² We are not persuaded by plaintiff-appellee's recital of the legislative history that Congress intended that the technical definition of a "state" commonly used in international law should circumscribe the meaning to be given that word in section 401 of the Nationality Act. The Act deals with a particular class of problems removed from the usual international law context.

legal and practical restrictions on its power to govern itself could not be controlling on that question.

"Germany at all times remained a political entity—an entity to which men and women could give formal allegiance and in which they could hold citizenship.¹ This situation was quite consonant with Allied policy. Although the destruction of the 'Nazi State' was one of our war aims, and the attempted eradication of Nazi influences was one of the first measures to be taken by our occupying forces, governmental units staffed by Germans and responsible for many aspects of domestic government remained in existence, or were revived, with the consent and support of the American Military Government. From the start of the occupation, it was the policy of our Government to reconstitute German administrative machinery and to initiate German self-government, all looking toward the emergence of a new Germany.²

"It becomes clearer that Germany was, for our purposes, a 'state' when we consider the nature of the election of June 30, 1946, in which plaintiff-appellee participated. The general background of this and other elections held in the American

¹ To paraphrase an opinion dealing with voting in Japanese elections:

"To hold that [Germany] is not a foreign state is to say that a citizen of the United States may not only vote with impunity in [German] elections, but also without loss of citizenship apply for and obtain naturalization in [Germany], see section 801 (a) [of the Nationality Act of 1940]; take an oath of allegiance to [Germany], see section 801 (b); accept an office in the government of [Germany], see section 801 (d); make a formal renunciation of his United States citizenship in [Germany], see section 801 (f). Surely Congress could not have intended that such actions, if voluntarily done, would leave United States citizenship unaffected."

Kuwahara v. Acheson, D.C.S.D. Cal., 96 F.Supp. 38, 40-41.

² The Department of State described that policy thus in 1947:

"The United States has consistently stressed the principle that administrative functions should be delegated as rapidly as feasible to Germans of approved character and political reliability. This was done early in the occupation for local government units (*Gemeinde*, *Kreis*). By October 1945, three state administrations had been set up in the zone—Bavaria, North Württemberg-Baden, and Greater Hesse—in addition to the separate administration for the Bremen enclave. In each *Land*, or state, appointed officials headed by a Minister-President were assigned full responsibility for internal affairs not involving security considerations. All aspects of German administration were carefully scrutinized and supervised by military government, which, by January 1946, was separately constituted as the Office of Military Government (OMGUS). During 1946 additional administrative functions were progressively transferred from military government to German officials and agencies at all administrative levels. As noted earlier even such vital tasks as denazification are now undertaken by Germans. Appointive provisional parliaments, advisory in character, were set up in each *Land*. American policy is insistent that democratization can be achieved only through practical experience and the assumption by the Germans of direct responsibility for governmental actions."

Occupation of Germany, Policy and Progress, 1945-46, Department of State Publication 2783, European Series 23, at p.45 (U.S. Government Printing Office, 1947). This document was considered by the District Court and is part of the record here.

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Zone of Germany in the early period of the occupation is described as follows in *Occupation of Germany, Policy and Progress, 1945-46*, issued by the Department of State in 1947:¹

'(b) *Elections*. It has been United States policy to foster democratic development by holding free elections. In this respect this Government has been in advance of the other powers. The first postwar elections in Germany, January 20 and 27, 1946, were for local councils in communities of less than 20,000 in the U.S. zone. Later elections have occurred as follows: for larger towns and rural counties, April 28; for cities, May 26; for *Land* constitutional assemblies, June 30; on *Länder* constitutions and for *Länder diets*, November 24 and December 1. Participation of qualified voters has been large, ranging from 60 to 89 per cent. As a consequence of this series of elections two dominating parties have emerged, the CDU (CSU in Bavaria) and the SPD. . . .

'(c) *Constitutions*. The United States has also taken the initiative in seeking to restore a constitutional basis for the political life of Germany. In each *Land* of the U.S. zone constitutional assemblies, chosen by popular election on June 30, 1946, convened during the summer and drew up state constitutions on the basis of initial drafts prepared by special committees appointed by the three ministers-president. Vigorous controversy centered around such issues as the nature and powers of the executive, the existence and composition of a second chamber, religious influence in the schools, and the socialization of key industries. Military Government gave a free hand to the assemblies except to prescribe that the documents insure democratic processes, the safeguarding of civil rights, and the supremacy of law. . . .'

"The election of June 30, 1946, was thus held to choose a constitutional assembly for each *Land* or state. It was 'fought on German political lines with lists of candidates put up by the political parties then licensed by American Military Government'.²

"Plaintiff-appellee does not challenge this factual description of the election. She argues, however, that it was not a 'political election'—that it was more in the nature of 'a straw vote or opinion poll, since it was merely advisory as far as the Office of Military Government of the United States was concerned'. Nor does the Government dispute her statement that 'Pursuant to its supreme authority the United States at all times had the power to alter the date of the election, to call off the election or to declare the results of the election null and

¹ At pp. 55, 57.

² Memorandum prepared in the Department of State under date of February 1, 1950, received as defendant's Exhibit No. 3 in the District Court. Plaintiff-appellee was qualified to vote because she had been a German citizen before 1939 and had not been a member of the Nazi party. She had dual nationality—German and American.

void, and ultimately to approve, modify or disapprove any provincial constitution which the delegates might agree upon.' (Br. p. 18). It is plaintiff-appellee's contention that the 1946 balloting was not a 'political election' because it was not 'a decisive election of persons to fill offices in, or to determine issues relating to an organized government or body politic. . . .' (Br. p. 16).

"This argument has force. But we think the intent of Congress in the Nationality Act was to attach the consequence of loss of citizenship to conduct which substantially evidences allegiance to a Government existing in a territory other than our own. It cannot be determinative that the foreign territory may not have democratic institutions independent of external control. No narrow or technical meaning can be ascribed to the phrase 'political election' as Congress used it in the Nationality Act. We think that formal balloting to choose representatives or delegates is an 'election', and we think it is 'political' if it 'pertain[s] to the exercise of the rights and privileges or the influence by which the individuals of a state seek to determine or control its public policy. . . .' Webster's New International Dictionary (2nd ed. 1948) ('Political,' meaning 3).

"When we come to consider the meaning of section 401 (e) as a whole, it becomes apparent that Congress there sought to distinguish between acts performed in the interest of maintaining our own governmental institutions and acts which tend to support or implement institutions other than our own. The election in which plaintiff-appellee voted was the basic step towards the restoration of organized government of, by and for the German people.¹ As such, regardless of the fact that it was conducted under American auspices, in an area occupied by the American armed forces, and subject to American veto, it was a 'political election in a foreign state' within the meaning of the statute.

"No other court of appeals has to our knowledge had occasion to pass on the questions just considered as they relate to post-war Germany.² However, the Ninth Circuit has ruled that the elections of 1946-47 held under the auspices of the American military authorities in occupied Japan were 'political elections in a foreign state', within the meaning of the Nationality Act. *Acheson v. Kuniyuki*, 9 Cir., 189 F. 2d 741,

¹ Cf. Gladstone: "What they [the Achaians] seem to have brought with them was the true political spirit; the faculty of nation-making". Homer, vii, 100. Quoted in Murray, *New English Dictionary*, sub. "political".

² Three district Courts, however, have ruled that various post-war German elections were not within the purview of Section 401. *Brehm v. Acheson*, D.C.S.D.Tex., 90 F.Supp. 662; *In re Riedner*, D.C.E.D.Wis., 94, F.Supp. 289, 294; see *Acheson v. Droesse*, 90 U.S. App. D.C.—, 197 F. 2d 574, dismissing appeal as moot and vacating judgment of District Court.

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Contd.

rehearing denied 9 Cir., 190 F. 2d 897, *certiorari* denied 342 U.S. 942, 72 S.Ct. 554.¹ We reach a like conclusion here."

[Reports: 196 F. 2d 866; *certiorari* denied, 344 U.S. 833, 73 S. Ct. 40, 97 L. Ed. 648.]

NOTE.—See, with respect to the law in effect in the American Zone of Germany, *Kent Jewelry Corp. v. Kiefer* (1952), 119 N.Y.S. 2d 242, 250-251. For contrary decisions with respect to the effect of voting in an election in American-occupied territory see *Furusho v. Acheson* (1951), 94 F. Supp. 1021, and *Furuno v. Acheson* (1952), 106 F. Supp. 775, and the similar decisions there cited. But see also *Acheson v. Mariko Kuniyuki* (1951), 189 F. 2d 741, 190 F. 2d 897, *certiorari* denied (1952), 342 U.S. 942, 72 S. Ct. 554, 96 L. Ed. 701, and *Uyeno v. Acheson* (1951), 96 F. Supp. 510. See also, with respect to expatriation by voting, *Acheson v. Droesse* (1952), 197 F. 2d 574, *Scavone v. Acheson* (1952), 103 F. Supp. 59, and *Grassi v. Acheson* (1951), 101 F. Supp. 431.

For an important survey of expatriation law, in a case where, expatriation not being found, the dual national was held to have committed treason, see *Tomoya Kawakita v. United States* (1950), 96 F. Supp. 824, 190 F. 2d 506, 343 U.S. 717, 72 S. Ct. 950, 96 L. Ed. 1343 (1951); *International Law Reports*, 1951, Case No. 73. On expatriation by foreign military service see *Morizumi v. Acheson* (1951), 101 F. Supp. 976, and *Mazza v. Acheson* (1952), 104 F. Supp. 157, and the cases there cited, as well as *Paracchini v. McGrath* (1952), 103 F. Supp. 184, and *Perri v. Acheson* (1952), 105 F. Supp. 434. For a finding of expatriation by the taking of an oath of allegiance to Hitler see *Jost v. Acheson* (1952), 104 F. Supp. 41.

See also, with particular regard to the elements of intent and of ratification in expatriation, *Boissonnas v. Acheson* (1951), 101 F. Supp. 138.

For a discussion of the "foreign" character of United States-occupied areas see Green, "Applicability of American Laws to Overseas Areas Controlled by the United States," in *Harvard Law Review*, 68 (1955), pp. 781, 799-800. See also *Schaffner v. International Refugee Organization*, decided in 1951 by the United States Court of Appeals, Allied High Commission for Germany: *International Law Reports*, 1951, Case No. 139.

Case
No. 60

Nationality—Loss of—By Expatriation—Entry into Service of Foreign State—Automatic Loss of Nationality—Expatriation of Wife of Expatriate—The Law of the Netherlands.

In re WARRIS.

Holland, Supreme Court. November 5, 1952.

THE FACTS.—Warris, a Netherlands subject, entered the service of a foreign (*in casu*, enemy) State during the Second

¹ The opinion expressly approves the holdings in *Kuwahara v. Acheson*, D.C. S.D.Cal., 96 F.Supp. 38, and *Uyeno v. Acheson*, D.C.W.D.Wash., 96 F.Supp. 510, and expressly disapproves the contrary holdings in nine district court decisions in the Ninth Circuit.

World War and, in consequence, had lost his Dutch citizenship. The municipal authorities of Zeist, where they resided, refused to insert his wife's name in the register of voters, on the ground that she had lost her nationality simultaneously with her husband. The latter¹ applied to the Cantonal Court of Utrecht for an order that his wife's name should nevertheless be inserted, but the application was refused. On his appeal to the Supreme Court,

Held: that the appeal must fail. In all except the second of the five cases in which Netherlands citizenship is lost under the Netherlands Nationality Law of 1892,² that loss occurs on the mere happening of the events or circumstances specified in the Law, without any constitutive decision of an administrative or judicial authority.

[Report: *N.J.*, 1952, No. 782.]

Nationality—Loss of—By Entry into Service of Foreign State —Entry of Austrian National into Service of German Reich While Austria Part of Germany—Whether such Entry results in Loss of Austrian Nationality. Case No. 61

R. v. PROVINCIAL GOVERNMENT OF UPPER AUSTRIA.

Austria, Administrative Court.

May 6, 1952.

THE FACTS.—The Austrian Transitional Nationality Law of 1949 provides, *inter alia*, that persons who were Austrian citizens on March 13, 1938 (the date of the annexation of Austria by Germany), and who compulsorily acquired German nationality thereafter, re-acquired Austrian nationality as from April 27, 1945. The Law of 1949 excepted from its operation those who, between the dates referred to, had lost their Austrian nationality by virtue of the Austrian Law of July 30, 1925, which provided, *inter alia*, that Austrian citizens automatically lost their Austrian nationality upon entry into the public service of a foreign State.

The appellant was the Austrian-born widow of an Austrian national who entered the public service of the German Reich in June 1939. It was conceded that if Austria had been an

¹ Under Dutch Law, any interested party can at any time apply to the Court in respect of the loss of Dutch nationality by another person.

² Article 7 of the Law of 1892 provides that Netherlands citizenship shall lapse on: (1) naturalization in a foreign country; (2) release by the Crown of a dual national from his Netherlands citizenship at his request and under specified conditions; (3) voluntary acquisition of a foreign nationality otherwise than by naturalization; (4) unauthorized entering into the military or other service of a foreign State; (5) omission by a Netherlands citizen domiciled in a foreign country to declare before the expiry of ten years his desire to remain a Netherlands citizen.

**Case
No. 61
Contd.**

independent State on that date (and had not then formed part of the German Reich), the appellant's husband (who died in 1942) would have ceased to be an Austrian citizen in June 1939, and that the appellant's nationality would have undergone the same change. It was contended on the appellant's behalf that as there was no Austrian nationality in 1939 and as at the time Austria formed part of Germany, her late husband's entry into the service of the German Reich was not an entry into the service of a foreign State so as to bring about the loss of Austrian nationality in pursuance of the Austrian Law of 1925, and that she was accordingly entitled to a declaration that she was an Austrian national as from April 27, 1945. The Court said:

"Having regard to the fact that the nationality of the appellant depends on that of her husband, we must examine the question as to whether the entry of the latter into the service of the Hanover Academy as an assistant and a lecturer would have constituted one of the circumstances resulting in the loss of (Austrian) nationality if Austria had not been incorporated into the German Reich. The voluntary entry of a person into the public service of a foreign State is certainly one such circumstance. The respondents took the view that the appellant's husband voluntarily entered the public service of the German Reich. This fact would have entailed the loss of his Austrian nationality if Austria had still been an independent State when he was appointed a lecturer, the reason presumably being that the respondents considered the territory of the then German Reich, in so far as it included the territory of what is now the Republic of Austria (the so-called old Reich), to be a foreign country while Austria was occupied by the German Reich. The respondents conclude from this view of the matter, *viz.*, that the territory of the old Reich was a foreign country, that the husband of the appellant satisfied the requirement of a voluntary entry into the public service of a foreign State. This Court cannot share that view. The use of the terms 'foreign country' and 'home country' (*Inland*) in relation to the territory of the German Reich while the latter occupied Austria is not possible because there was only one State territory, in which the territory of the incorporated State had been merged. It follows that the entry of a former Austrian citizen into the public service of the Reich while Austria was under German occupation cannot constitute a ground leading to the loss of Austrian nationality. The respondents, in taking the view that such a ground existed in the person of the appellant's husband, interpreted the law erroneously. The finding that the appellant is not an Austrian citizen is therefore contrary to the law."

[Report: Vw GH (A), 7 (1952), p. 296.]

Nationality—Loss of—Effect of Restoration of Territory Purportedly Annexed during War—Italian Annexation of Lubiana.

See Case No. 57 (*Kozuh v. Uff. Stato Civile di Milano*).

IX.—Nationality of Married Women

Nationality—Married Women—Loss of Nationality on Expatriation of Husband.

See Case No. 60 (*In re Warris*).

X.—Option

Nationality—Option of—General Right of Option—Exclusion by Express Provision for Option or Renunciation of Citizenship.

**Case
No. 62**

In re HEHANUSSA.

Holland, District Court of The Hague. January 2, 1950.

Court of Appeal of The Hague. November 6, 1952.

THE FACTS.—In 1950, Hehanussa, an Amboinese living in the Netherlands, formally renounced Indonesian citizenship under the Netherlands-Indonesian Convention of December 27, 1949, relating to the Status of Citizens Resulting from the Transfer of Sovereignty from the Netherlands to the Republic of the United States of Indonesia, one of the instruments drawn up by the Round Table Conference of 1949. He then applied for registration on the list of voters as a Netherlands citizen. When the validity of his renunciation was contested, he applied to the District Court for a declaratory judgment that it was valid.

Held (by the District Court): that the application must be granted. Hehanussa was entitled to repudiate Indonesian citizenship because, although he belonged to the indigenous population, under the Netherlands Indies legislation in force before the transfer of sovereignty he had been assimilated to Europeans.

On appeal,

Held (by the Court of Appeal): that the decision of the Court below must be reversed. The appellant belonged to the indigenous population of Indonesia and therefore had no right under the Convention of 1949 to renounce Indonesian citizenship. He had put forward as a modern conception of international law that on a transfer of territory the population of the

Case
No. 62
Contd.

territory concerned has a right of option as to nationality. The conception was a reasonable one and could perhaps be successfully invoked in case of silence on the point, or of obscurity in the terms of the relevant agreement entered into by the contracting parties. But it had no application where, as in the present case, the right of option, or of renunciation of citizenship, had unambiguously been granted in the instrument of cession of sovereignty.

[Report: *N.J.*, 1953, No. 59.]

XII.—Nationality of Corporations

[See also PART XI, WAR AND NEUTRALITY: A, VI, Enemy Character.]

Case
No. 63

Nationality—Of Companies—As Determined by Seat.

SOCIÉTÉ BIRO PATENTE A.G. *v.* LAFOREST

France, Tribunal Civil de la Seine.

March 12, 1952.

THE FACTS.—This was an action for infringement of trade marks. The plaintiff Company was incorporated in Switzerland, but a controlling interest in it was held by a British national. The defendant Company, which was French, asked the Court to order the plaintiff Company, as an alien company, to give security for costs. Under a Franco-Swiss Treaty of April 15, 1869, Swiss nationals were in France exempt from the payment of security for costs. On the other hand, British nationals were exempt only if they were resident in France, which was not the case here. The question before the Court was whether the nationality of the plaintiff Company was determined by its seat or by the nature of its control.

Held: that the plaintiff Company was not required to give security for costs. The position of foreign companies in France was governed by diplomatic agreements concluded with the country in which they were incorporated or to which they subsequently transferred their seat. The Court said:

“It is not contested that the plaintiff Company, which was incorporated in Switzerland and has its seat there, has Swiss legal status. The classic theory, according to which the nationality of a company was determined by its seat, has evolved somewhat, originally owing to the circumstances of war. However, a distinction between the country of its legal status and its political allegiance, determined by reference to the nationality of the majority shareholders who thus effectively controlled the activities of the company, has been made only in the case of a company which has its seat in France;

even though authors and Courts have not been unanimous on the subject. While the law of treaties seems to follow the same principles, the position of foreign companies, who are enabled to exercise all their rights in France on the basis of the legislation established by the Law of May 20, 1857, can be governed only by the diplomatic agreements concluded with the country where they were incorporated or to which they subsequently transferred their seat. Accordingly, the plaintiff Company, which was regularly incorporated in Switzerland, enjoys the private rights conferred on Swiss nationals by treaties between France and the Helvetic Confederation—in particular, the Treaty of June 15, 1869, exempting Swiss nationals in France from the payment of security for costs—and the question where the controlling interest lies is irrelevant.”

[Report: *Revue critique de droit international privé*, 41 (1952), p. 703.]

C—ALIENS

II.—Position of Aliens

iii.—Treatment by and Responsibilities of the Receiving State

Aliens—Treatment of—Exercise of Trade—Franco-Spanish Convention of 1862—International Law—Relation to Municipal Law—French Constitution of 1946—Absence of Conflict between International and Municipal Law. **Case No. 64**

In re COLL (No. 1).

France, Court of Appeal of Paris.

January 24, 1952.

THE FACTS.—This was an appeal by one Coll, a Spanish national, against his conviction for having engaged in commerce in France without having obtained the special permit, required by Decree-Law of November 12, 1938, entitling an alien so to do. It was contended on behalf of the appellant that the Franco-Spanish Convention of 1862 entitled Spanish nationals to engage in commerce in France without being subjected to any obligations other than those imposed on French nationals, and that, by virtue of Articles 27 and 28 of the Constitution, which laid down the principle of the superiority of treaties to municipal laws, that Convention could not be set

**Case
No. 64
Contd.**

aside by a municipal law such as the Decree-Law of November 12, 1938.

Held: that the appeal must be dismissed. The Court said: "The Decree-Law in no way derogated from the Convention of 1862. It is a measure of supervision and control taken by the French State in the plenitude of its sovereignty, in order to enable it to check the exercise by aliens of a professional activity of the highest concern to the national economy. At the same time the Convention of 1862 makes obligatory the issue to Spanish nationals of the permit to engage in commerce (Niboyer, *Cours de droit international privé*, 1946, pp. 291-2). It thus does not appear that the Decree-Law of November 12, 1938, which is different in aim and purpose from the Convention of 1862, infringed the right to engage in commerce conferred on Spanish nationals by that Convention in conformity with Article 11 of the French Civil Code. Accordingly, that Law of supervision and control is applicable to Spanish nationals in the same way as to other aliens."

[Report: *Revue critique de droit international privé*, 41 (1952), p. 471.]

**Case
No. 65**

Aliens—Treatment of—Freedom of Residence—Compatibility with Requirement of Residence Permit—Treaties—Relation to Municipal Law.

In re COLL (No. 2).

France, Court of Appeal of Paris.
November 6, 1952.

THE FACTS.—This was an appeal by one Coll, a Spanish national, against a judgment of the *Tribunal correctionnel de la Seine*, of March 4, 1950, sentencing him to a fine and imprisonment for having failed to renew his residence permit, which expired on October 12, 1949, in violation of Article 19 of the Ordinance of November 2, 1945. It was contended on behalf of the appellant that the Franco-Spanish Convention of January 7, 1862, entitled Spanish nationals to reside freely in France, and that, by virtue of Articles 27 and 28 of the Constitution, which laid down the principle of the superiority of treaties to municipal laws, that Convention could not be set aside by a municipal law such as the Ordinance of November 2, 1945.

Held: that the judgment of the lower Court must be quashed, for the reason that Coll had in fact asked for a new residence permit and been given a receipt attesting that request, which, according to Article 6 of the Ordinance of November 2, 1945, could provisionally serve as a permit. With

regard to the contention of the appellant set forth above, the Court said:

"Article 11 of the Civil Code provides that aliens shall enjoy in France the same civil rights as those granted to French nationals by the treaties of the country to which they belong. The Convention of 1862 gave Spanish nationals in France certain rights which in the absence of a treaty between their country and France they had previously not enjoyed. The Ordinance of November 2, 1945, in no way infringed the rights of Spanish nationals under that Convention. It is a measure of supervision and control taken by the French State in order to enable it to keep a watch on aliens residing on its territory which was made particularly necessary by the increase of immigration. No provision of the 1862 Convention suggests that France intended to renounce that right of supervision which derives from its sovereignty."

[Report: *Dalloz hebdomadaire*, 1953, *Jurisprudence*, p. 102.]

Aliens—Treatment of—Exercise of Trade—Franco-Spanish Convention of 1862—International Law—Relation to Municipal Law—French Constitution of 1946. **Case No. 66**

MINISTÈRE PUBLIC v. S.

France, Court of Appeal of Lyons,
February 16, 1952.

THE FACTS.—S., a Spanish national, had lawfully entered France in 1947, and there obtained a residence permit and a work permit. He was employed by a company in Lyons which, as from September 1947, gave him full powers to act on its behalf. He was now prosecuted for having engaged in commerce without having obtained the special permit entitling an alien to do so.

Held: that S. must be acquitted. The Franco-Spanish Convention of 1862 entitled Spanish nationals to engage in commerce in France. Treaties were superior in authority to municipal laws. The Court said:

"S. has admitted that between September 10, 1947, and December 12, 1951, he personally, by virtue of the powers granted him, effected all the commercial transactions relating to the purposes of the Company. During that period he thus exercised a commercial profession.

"However, he cannot be charged with having exercised that commercial profession on French territory without having obtained the special permit entitling an alien so to do. The Franco-Spanish Convention of January 7, 1862, duly ratified and promulgated, provides in Article 1 that 'the nationals of each of the two countries may travel and reside in the territory

**Case
No. 66
Contd.**

of the other on the same basis as its own nationals, settle where they consider desirable for their interests . . . engage in industry, and in wholesale and retail trade . . . rent houses and shops as may be necessary . . . observing in all these cases the conditions laid down by law and regulations applicable to nationals. . . .’ That provision placed no restriction on the commercial freedom of Spanish nationals resident in France other than the requirement to comply with laws and regulations applicable to French nationals. It thus by implication excluded the applicability of laws and regulations applicable to other aliens. . . .

“It is not required by the Convention that the person concerned should have entered France with the intention of engaging in commerce—which would exclude from its scope persons who entered for the purpose of finding salaried employment and later engaged in commerce. Article 1 of the Convention states clearly that Spanish nationals resident in France are free to take such steps as are ‘desirable for their interests’ or required by the needs which they face.

“All the above-mentioned provisions of the Convention of 1862 are clear and cannot give rise to any difficulty of interpretation.

“Article 26 of the French Constitution of October 27, 1946, lays down that ‘diplomatic treaties regularly ratified and published shall have force of law even if they conflict with French laws’. Article 28 restates that principle of the supremacy of treaties over municipal laws.”

[Report: *Dalloz hebdomadaire*, 1952, *Jurisprudence*, p. 801.]

NOTE.—See, to the same effect, *In re Mayol*, decided by the *Tribunal Correctionnel de la Seine* on May 9, 1952 (*Revue Critique de droit international privé*, 41 (1952), p. 473); and, with respect to a Danish national, *In re Orbeck*, decided by the same Court on the same date (*ibid.*, p. 474).

Contrast *In re Coll* (No. 1) (Case No. 64 in this volume).

**Case
No. 67**

Aliens—Treatment of—Régime of Capitulations—American Nationals in Morocco—Jurisdiction—Exemptions and Limitations upon—Foreign Nationals in Morocco—International Law—Relation to Municipal Law—Binding Force of Decisions of the International Court of Justice.

ADMINISTRATION DES HABOUS *v.* DEAL.

Morocco, Court of Appeal of Rabat.

November 12, 1952.

THE FACTS.—In January 1952, the appellant had brought an action before the *Juge des référés* at Casablanca for the eviction of the respondent, an American national, from the

Garage Habous at Casablanca which the latter had rented for a period of two years, expiring in December 1951. The *Juge des référés* declared himself incompetent on the ground that American nationals in Morocco were not subject to the jurisdiction of the French courts. It was now contended by the appellant that American nationals in Morocco were subject to the jurisdiction of the French courts.

Held: that the French courts had jurisdiction with regard to a dispute involving a Moroccan national on the one hand and an American national on the other, in which the American national was unable to invoke a special jurisdictional privilege in the circumstances defined by the International Court of Justice on August 27, 1952. The Court said:

"According to the terms of the Judgment of August 27, 1952, of the International Court of Justice, concerning the *Rights of United States Nationals in Morocco*,¹ the United States are entitled, by virtue of the provisions of the Treaty concluded between the United States and Morocco in 1836, to exercise their consular jurisdiction with respect to all civil and criminal disputes *between* American citizens and protected persons in the French Zone of the Shereefian Empire. No similar privilege exists with regard to civil or criminal actions instituted against American nationals, except in cases specially provided for in the Act of Algeciras, and in particular Articles 19-29, 49, 59, 86-102 thereof, which do not apply to the present case. In respect of disputes which are not subject to the consular jurisdiction of the United States, American nationals are subject to the local courts.

"In Morocco there have always been, side by side, three types of courts, which had jurisdiction respectively over three groups of persons, individuals or bodies corporate, who, by virtue of their nationality or other distinguishing feature, came ordinarily and necessarily within that jurisdiction in accordance with the principles of the Protectorate Treaty and the *Dahir* on the judicial organization of the French Protectorate in Morocco (Articles 2 and 7 of the *Dahir* of August 12, 1913). The determining factor for a division of judicial competence, including American consular jurisdiction, remained that of the nationality, or rather the character, of the parties. Thus, it was admitted as a general rule that Moroccan subjects alone were subject to the jurisdiction of the Shereefian courts. Non-Moroccans, French or alien, were subject to the jurisdiction of the French courts. American nationals formed a third group, being the only ones to enjoy special jurisdictional privileges.

¹ See Case No. 51 in this volume.

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No. 67
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"Article 7 of the *Dahir* on judicial organization, which gives the French courts jurisdiction over foreign nationals, refers to two categories of States: (1) those the Government of which had renounced jurisdictional privileges; (2) those which did not enjoy any jurisdictional privileges in Morocco. However, it seems clear, and follows from the principles set forth above and from Article 7 itself, that since the Hague Judgment, and subject to the reservations therein contained, American nationals who are involved in a dispute with Moroccan nationals *in respect of which they cannot invoke a jurisdictional privilege* are subject to the same courts as other foreign nationals, namely, the French courts."

[Report: *Revue critique de Droit international privé*, 42 (1953), p. 154.]

Case
No. 68

Aliens—Treatment of—Residents—Liability to Military Service—The Law of Israel.

By the Israel Defence Service Law 5709-1949, compulsory military service was imposed upon all persons permanently resident in Israel, regardless of their nationality. Commenting upon this in *Maccabian v. Minister of Defence*, decided by the Supreme Court sitting as the High Court of Justice on September 25, 1952, Judge Zeltner explained that when the Law was enacted there was as yet no Israel nationality law, so that "the legislator could not base the obligation to compulsory military service on nationality, as was the position in most countries. The legislator therefore had no choice but to find some other criterion, and it was natural for it to lay down that persons residing in the country should also assume the burden of sharing in its defence."

[Report: *Piskei-Din*, 6 (1952), p. 844.]

Cf. Feldman v. Minister of Defence, in which the same Court decided on March 2, 1954, that a person who, while a resident in Israel, had been legally inducted into the army, but who had subsequently acquired a passport of a foreign country and an entry visa into that country, was not thereby exempt from further military service. [Reports: *Piskei-Din*, 8 (1954), p. 280; *Pesakim Elyonim*, 14 (1954), p. 479.]

Aliens—Treatment of—Right to Engage in Commerce.

See Case No. 1 (*Ministère Public v. Cot-Riera*).

Aliens—Position of—Right to Sue—Reciprocity.

See Case No. 119 (*Marcos v. United States*).

Aliens — Equality of Treatment — Most-Favoured-Nation Clause—Protected and Protecting States—Method of Assessing Customs Duties.

See Case No. 51 (*Case Concerning Rights of Nationals of the United States of America in Morocco (France v. U.S.A.)*).

Aliens—Position of—Residence—"Permission to reside"—Meaning of.

See Case No. 107 (*Re Rizzo and Others*).

v.—Respect for Property. Expropriation

[See also PART IV, JURISDICTION: A, I, Territorial.]

Aliens—Position of—Subjection to Law of Territorial State—Property Rights.

See Case No. 92 (*In re Arbulich's Estate*).

Aliens—Position of—Right to Acquire Property—Human Rights—Charter of the United Nations.

See Case No. 53 (*Fujii v. State of California*).

III.—Expulsion of Aliens

i.—Right of Expulsion

Aliens—Expulsion of—Right of Expulsion—Individual Case Liberties Guaranteed by the Constitution and Liability to Expulsion—The Law of the United States of America. No. 69

HARISIADES v. SHAUGHNESSY.

United States, District Court, Southern District, New York.

February 9, 1950.

Court of Appeals, Second Circuit. February 6, 1951.

Supreme Court. March 10, 1952.

THE FACTS (as stated in the decision of the Supreme Court).—
 " Harisiades, a Greek national, accompanied his father to the United States in 1916, when thirteen years of age, and has resided here since. He has taken a wife and sired two children, all citizens. He joined the Communist Party in 1925, when it was known as the Workers Party, and served as an organizer, Branch Executive Committeeman, secretary of its Greek Bureau, and editor of its paper 'Empros'. The party discontinued his membership, along with that of other aliens, in 1939, but he has continued association with members. He was familiar with the principles and philosophy of the Communist Party and says he still believes in them. He disclaims

Case
No. 69
Contd.

personal belief in use of force and violence and asserts that the party favoured their use only in defence. A warrant for his deportation because of his membership was issued in 1930 but was not served until 1946. The delay was due to inability to locate him because of his use of a number of aliases. After hearings, he was ordered deported on the grounds that after entry he had been a member of an organization which advocates overthrow of the Government by force and violence and distributes printed matter so advocating. He sought release by *habeas corpus*."

Held (by the District Court): that the writ of *habeas corpus* must be dismissed. The conclusion that during petitioner's membership in the Communist Party the party plotted and advocated the overthrow of the Government by force and circulated literature to that effect was established before the Board of Immigration Appeals which held petitioner deportable. The Court further held that the Alien Registration Act of 1940 (54 Stat. 670, 8 U.S.C. section 137), making *past* membership in the Communist Party a ground for deportation, under which deportation had been ordered, was not an *ex post facto* law forbidden by the Constitution because it was not a criminal statute, and that the Act did not violate the First and Fifth Amendments to the Constitution.

On appeal,

Held (by the Court of Appeals): that the dismissal of the writ of *habeas corpus* must be affirmed. The Court said:

"It must be conceded that a most persuasive argument both on principle and on authority has been advanced in support of the absolute power of Congress. A sovereign may exclude aliens altogether or may admit them on such terms as it chooses to impose. While an alien is allowed to remain here he is accorded certain constitutional protections but his licence to remain is revocable at the sovereign's will; thereafter with respect to deportation he is entitled only to 'procedural due process', that is, that he be given notice of the hearing and opportunity to show that he does not come within the classification of aliens whose deportation Congress has directed.

"Nevertheless it is unnecessary to rest decision upon the principle that Congress has absolute and unqualified power with respect to the deportation of aliens. Even if the power be not absolutely unlimited and if we assume that a statute would be invalid which directed deportation for some cause having no rational relation to the public welfare, as for example, that all blue-eyed aliens be deported, this is not such a case. The statute here involved is directed against those who have at any time confederated to overthrow the Government by force,

and we hold that its present application is not unconstitutional. No society need continue to harbor aliens who have joined a group who propose to destroy the society itself."

On *certiorari*, the instant case was decided with two other cases, *Mascitti v. McGrath* and *Coleman v. McGrath*, also involving deportation proceedings against aliens who had been members of the Communist Party prior to the Alien Registration Act of 1940.

Held (by the Supreme Court, Douglas and Black JJ. dissenting): that the deportation orders must be upheld in all three cases. The Court said:

"These aliens ask us to forbid their expulsion by a departure from the long-accepted application to such cases of the Fifth Amendment provision that no person shall be deprived of life, liberty or property without due process of law. Their basic contention is that admission for permanent residence confers a 'vested right' on the alien, equal to that of the citizen, to remain within the country, and that the alien is entitled to constitutional protection in that matter to the same extent as the citizen. Their second line of defence is that if any power to deport domiciled aliens exists it is so dispersed that the judiciary must concur in the grounds for its exercise to the extent of finding them reasonable. The argument goes on to the contention that the grounds prescribed by the Act of 1940 bear no reasonable relation to protection of legitimate interests of the United States and concludes that the Act should be declared invalid. Admittedly these propositions are not founded in precedents of this Court.

"For over thirty years each of these aliens has enjoyed such advantages as accrue from residence here without renouncing his foreign allegiance or formally acknowledging adherence to the Constitution he now invokes. Each was admitted to the United States, upon passing formidable exclusionary hurdles, in the hope that, after what may be called a probationary period, he would desire and be found desirable for citizenship. Each has been offered naturalization, with all of the rights and privileges of citizenship, conditioned only upon open and honest assumption of undivided allegiance to our Government. But acceptance was and is not compulsory. Each has been permitted to prolong his original nationality indefinitely.

"So long as one thus perpetuates a dual status as an American inhabitant but foreign citizen, he may derive advantages from two sources of law—American and international. He may claim protection against our Government unavailable to the citizen. As an alien he retains a claim upon the state of his citizenship to diplomatic intervention on his behalf,

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No. 69
Contd.

a patronage often of considerable value. The state of origin of each of these aliens could presently enter diplomatic remonstrance against these deportations if they were inconsistent with international law, the prevailing custom among nations or their own practices.

"The alien retains immunities from burdens which the citizen must shoulder. By withholding his allegiance from the United States, he leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect. In deference to it certain dispensations from conscription for any military service have been granted foreign nationals. They can not, consistently with our international commitments, be compelled 'to take part in the operations of war directed against their own country'. (Article 23, 1907 Hague Convention Respecting the Laws and Customs of War on Land, 36 Stat. 2301-2302.) In addition to such general immunities they may enjoy particular treaty privileges. (Borchard, *Diplomatic Protection of Citizens Abroad*, 64.)

"Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.

"War, of course, is the most usual occasion for extensive resort to the power. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.

"That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defence and reprisal confirmed by international law as a power inherent in every sovereign State. (' . . . [I]n strict law, a State can expel even domiciled aliens without so much as giving the reasons, the refusal of the expelling State to supply the reasons for expulsion to the home State of the expelled alien does not constitute an illegal, but only a very unfriendly act'. 1 Oppenheim, *International Law* (3rd ed.,

Roxburgh, 1920), 498-502, at 499. But *cf.* Oppenheim, *International Law* (7th ed., Lauterpacht, 1948), 630-634, at 631. See also 4 Moore, *International Law Digest*, 67-96, citing examples; *Wheaton's International Law* (6th ed., Keith, 1929) 210-211; *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S. Ct. 1016, 37 L.Ed. 905.) Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it."

The Court then denied that the power of deportation given by the Alien Registration Act, 1940, had been so unreasonably and harshly exercised as to render the statute unconstitutional under the Due Process Clause, stating:

"We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation. However desirable worldwide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defence and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers.

"The First Amendment is invoked as a barrier against this enactment. The claim is that in joining an organization advocating overthrow of Government by force and violence the alien has merely exercised freedoms of speech, press and assembly which that Amendment guarantees to him. We think the First Amendment does not prevent the deportation of these aliens.

"The remaining claim is that this Act conflicts with Article I, section 9, of the Constitution forbidding *ex post facto* enactments. An impression of retroactivity results from reading as a new and isolated enactment what is actually a continuation of prior legislation.

"However, even if the Act were found to be retroactive, to strike it down would require us to overrule the construction of the *ex post facto* provision which has been followed by this Court from earliest times. It always has been considered that that which it forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment. Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.

"We find none of the constitutional objections to the Act well founded. The judgments accordingly are affirmed."

Douglas J., with whom Black J. concurred, dissented, saying:

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"There are two possible bases for sustaining this Act:

"(1) A person who was once a Communist is tainted for all time and forever dangerous to our society; or

"(2) Punishment through banishment from the country may be placed upon an alien not for what he did, but for what his political views once were or are.

"Each of these is foreign to our philosophy. We repudiate our traditions of tolerance and our articles of faith based upon the Bill of Rights when we bow to them by sustaining an Act of Congress which has them as a foundation."

[Reports: 90 F. Supp. 397, 431; 187 F. 2d 137; 342 U.S. 580, 72 Sup. Ct. 512, 96 L.Ed. 586.]

NOTE.—Rehearing was denied in 343 U.S. 936, 72 Sup. Ct. 767, 96 L. Ed. 1344. The decision of the Supreme Court has been noted in *American Bar Association Journal*, 38 (1952), p. 590; *Annual Survey of American Law* 1952, p. 113; *George Washington Law Review*, 66 (1952), p. 105; *Virginia Law Review*, 38 (1952), p. 670.

Case
No. 70

Aliens—Expulsion of—Privileged Aliens—Alien Married to National—The Law of Belgium.

GIANOTIS *v.* MINISTER OF JUSTICE.

Belgium, Conseil d'État. March 21, 1952.

THE FACTS.—The complainant was a Greek national but was married to a Belgian woman who had retained Belgian nationality. He had been continually resident in Belgium since 1931. On October 17, 1950, a ministerial order was made in pursuance of a Law of September 28, 1939, concerning the status of aliens, providing for his expulsion from the Kingdom of Belgium. The Conseil d'État was now asked to annul the ministerial decision. It was contended on behalf of the complainant that the Law of 1939 was not applicable to him, since Article 2 of a Law of February 12, 1897, provided that a national of a country at peace with Belgium who was married to a Belgian national and had been continuously resident in Belgium for more than five years, could not be expelled.

Held: that the ministerial order of October 17, 1950, must be annulled. The Court said:

"Article 128 of the Constitution provides that an alien enjoys in Belgium the protection there granted to persons and to property, except as otherwise provided by the law. It thus gives the legislature the power to make exceptions to the principle of the assimilation of aliens to Belgian nationals. At the same time, these exceptions must be established by the clear and express will of the legislature.

“ Accordingly, the Law of September 28, 1939, can only limit the guarantees given to aliens by the Constitution and by Article 2 of the Law of February 12, 1897, in so far as such limitation is clearly expressed in its provisions. Article 1 of the Law of September 28, 1939, states that it was enacted ‘ in derogation of the laws and regulations on the status of aliens ’. It follows therefrom that that Law did not abrogate the Law of February 12, 1897, or that of October 12, 1918, which laid down permanent provisions for the duration of the war, and only derogates from them in so far as its provisions are incompatible with them. These derogations are clearly delimited in the Law of September 28, 1938, both as regards the power conferred on the Minister of Justice and as regards the institution of sanctions which may be imposed on aliens who fail to fulfil the obligations to which they are subjected, and on persons aiding and abetting them.

“ The essence of the dispute is the exact meaning of the term ‘ alien ’ as used in the Law of September 28, 1939. It cannot be inferred, either from the text of that Law or from the report to the King, that the term in dispute is there used in a different sense from that given to it in the Law of February 12, 1897, which expressly limits the meaning of the term ‘ alien ’ to non-privileged aliens. If it had been the intention of the Law of 1939 to enable the Minister of Justice to take measures with respect to privileged aliens, that intention should appear clearly from the terms of its provisions. No such power has been expressly conferred on the Minister of Justice. On the contrary, the terms of the report preceding the adoption of the Law lead one to believe that its purpose was to lay down measures with respect to aliens who, as a result of the exceptional political situation, had sought refuge in Belgium.

“ Accordingly, on the basis of the Law of September 28, 1939, no order of expulsion can be made or executed with respect to an alien who, as in this case, is a national of a country at peace with Belgium, has been resident in Belgium for more than five years, and continues to reside there on a permanent basis.”

[Report: *Pasicrisie belge* (1953), IV, p. 69.]

NOTE.—See, to the same effect, *Vitalis v. Minister of Justice*, decided by the Conseil d’État on May 30, 1952: *Pasicrisie belge* (1953), IV, p. 105).

See also *Vitalis v. Minister for Economic Affairs*, decided by the same Court on the same date (*ibid.*, p. 106), which concerned a Dutch national who had been born in Belgium, had lived there all his life, and was married to a Belgian national. In 1950 he was sentenced to six months’ imprisonment and on September 7, 1951, the *Conseil d’enquête économique pour étrangers*, because of the

**Case
No. 70
Contd.**

offence he had committed, withdrew his labour permit under Royal Decree No. 62 of November 16, 1939, confirmed by the Law of June 16, 1947, and ordered him to leave the country. He applied for the annulment of the expulsion order on the ground that he was entitled to the guarantees granted to privileged aliens by Article 2 of the Law of February 12, 1897, and could therefore not be expelled. It was *held* that the expulsion order must be annulled, seeing that the Decree of 1939 did not suppress the guarantees given to certain aliens by Article 2 of the Law of February 12, 1897, and therefore did not confer on the *Conseil* the power to order the complainant to leave the country.

Aliens—Expulsion of—Implied Renunciation of Right of Expulsion—Limits of.

See Case No. 107 (*Re Rizzo and Others*).

ii.—Procedure of Expulsion

**Case
No. 71**

Aliens—Expulsion of—Alien Threatened with Persecution in Country of Origin—The Law of the United States of America—Due Process of Law.

UNITED STATES *ex rel.* WATTS *v.* SHAUGHNESSY.

United States, District Court, Southern District of New York.
September 18, 1952.

THE FACTS.—This was a proceeding on a writ of *habeas corpus* instituted on behalf of an alien conceded to be subject to deportation. The alien, a Basque seaman and Spanish national, challenged the finding by the Commissioner of Immigration and Naturalization that “. . . after review of the facts in this case, I do not find that if this alien is deported to Spain, he would be subject to physical persecution”.¹

Held: that, since the Commissioner's finding amounted to a deprivation of due process of law, the writ must be sustained. The Court said:

“The Government does not assert in its Return to the petition that the alien is not entitled to the protection of the Fifth Amendment of the Constitution. Instead, the contention is made that the hearing and the evaluation of the testimony were fair in all respects and that courts may not substitute their judicial opinions for those vested exclusively in the executive by statute.

¹ The Internal Security Act of 1950, 8 U.S.C.A. 156 (a), provides: “No alien shall be deported under any provisions of this chapter to any country in which the Attorney-General shall find that such alien would be subjected to physical persecution.”

"The Fifth Amendment provides without qualification that no person shall 'be deprived of life, liberty, or property, without due process of law'. Judge Charles E. Clark in discussing this provision in *United States ex rel. Mezei v. Shaughnessy*, 2 Cir., 1952, 195 F. 2d 964, at page 967, stated:

'It is not confined to the protection of citizens; and its provisions, by definition, are "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220. They extend in fact to all whose presence here brings them within reach of the judicial and administrative processes of the United States Government. *United States v. Pink*, 315 U.S. 203, 228, 62 S.Ct. 552, 86 L.Ed. 797.'

"An alien who avails himself of a provision of law concerning a matter so vital that his very life and liberty may depend upon its just application is entitled to the thorough and surrounding protection of the Fifth Amendment. Any whittling away of this safeguard would enable the executive officer to treat cavalierly the provision under consideration, yet nowhere do I find, nor has the Government cited, any indication that the intention of Congress was to reduce the effectiveness of the Fifth Amendment in this area. The provision in question is, by strong analogy, consonant with our historic tradition of affording asylum to the persecuted, a tradition which reaches back beyond the birth of the Fifth Amendment itself.

"The language of the provision under consideration does not expressly confer discretion on the Attorney-General but in other parts of this subsection, the Attorney-General is authorized to perform certain acts 'in the discretion of the Attorney-General'. It would seem clear, therefore, that Congress was precise in its allocation of discretionary powers. It is also clear that a precondition of deportation cases such as this is a finding that there will not be persecution of the alien. This is a finding of fact and must be based on investigation which, in its method and in the formulation of the conclusion to which that investigation leads, must be fair and not arbitrary, reasoned and not capricious. The demands of the Fifth Amendment cannot be satisfied with less.

"I have read with utmost care the testimony of the relator given at the hearing held before an investigator of the Immigration and Naturalization Service. Such a close reading is necessary in order to determine whether there has been an arbitrary evaluation and whether relator's claim that he would be subjected to physical persecution if deported to Spain is valid. Counsel for relator was a representative of the International Rescue Committee, an organization which had

**Case
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Contd.**

interested itself in the alien. The hearing established without contradiction that the International Refugee Organization had certified relator to be a refugee from Spain, and that the Legal Office of the Provisional Intergovernmental Committee for the Movement of Migrants from Europe had determined him to be within the mandate eligible for Discretionary Resettlement Assistance as a Spanish Republican refugee. The Republic of France had certified to the International Rescue Committee that the alien was a Spanish refugee who had been residing in France for many years. I am setting forth in Appendix I of this Opinion those portions of the uncontradicted testimony before the hearing officer which convince me that the ultimate finding in this case could not have been based upon the facts elicited at the hearing. Surely the hearing was not afforded as an empty gesture. It was held, we must assume, for the purpose of eliciting all relevant evidence for ultimate, mature consideration.

"The testimonial summary of the investigator who heard the matter, was before the Commissioner when his Order of July 10 was made and states:

'The alien offers no evidence of a nature that he would be persecuted if returned to Spain.'

"In another portion of his summary, he says:

'There is no concrete evidence to substantiate his claim that he would be persecuted if returned to Spain.'

"These statements are made in the face of uncontradicted testimony by the alien that he has been a member of the Basque National Party in Spain and the Young Basque Group; that the Basque people want to gain their independence from Franco and have been against the régime at all times; that while living in France, the French Government certified that he was a Spanish refugee in exile and that he was registered with the International Refugee Organization and received a document certifying that he was a refugee from Spain. While in France, he attended Loyalist meetings, the Loyalists being an anti-Franco organization. He also attended meetings of the Basque National Party which is purposely a democratic anti-Franco organization. He was engaged in spreading underground propaganda and literature against the Franco régime. If found deportable he wants to go to any country except Spain. He stated further that he has never been interested in Communism and has never belonged to any Communist Party or any of its affiliates nor have any of his relatives, although they are all anti-Franco. Between 1946 and 1948 he was distributing anti-Franco literature in Spain. This is significant in the light of the fact that the Government makes much of his membership in the Young Franco movement between 1946

and 1948, which the alien testified he was compelled to join in Spain in order to obtain the right to employment. The record would seem to indicate that while he was in this organization he was still active in distributing anti-Franco literature and in fact was imprisoned for two months in 1947 for this activity. He was in a 'concentration camp' (actually, a collection camp apparently like Ellis Island) in Genoa where he participated in a hunger strike for eight days because the Italian officials refused to release him unless he would agree to return to Spain, which he refused to do. This incident is known to the Spanish Government. His father is also a member of these organizations opposed to the Franco régime, and one of his uncles was a captain who fought against Franco in the Basque regiment in the Spanish Civil War. In France, he declared himself against Franco openly. He was sent out of Spain to France at the age of ten with thousands of Spanish Basque children, because the Spanish Nationalist Government sought to prevent their falling into the hands of the Franco Government. He returned to Spain at the age of nineteen in order to carry out propaganda for the Basque party, and it was during this period that he was imprisoned. He also testified that his father, who was a follower of the Basque party, was persecuted by the Franco régime and imprisoned for a period of five years.

"In the face of this rather brief summary of the testimony, it is inconceivable that the investigator, summarizing the evidence for the Commissioner, would state that the alien offered 'no evidence of a nature that he would be persecuted if returned to Spain'. Instead, the investigator seems to have based his recommendations upon the following: 'The only indication that the alien was ever considered to be a political enemy of the Franco régime was when he was incarcerated for two months in 1947 in that he was suspected of being a Loyalist. Apparently, the alien has overcome this condition, in that he became a member of the Franco Youth Group, when it served his convenience, from 1946 to 1948.' The alien gave a most reasonable explanation of his membership in the Franco Youth Group. In short, it amounted to this: He had to have food and sustenance and in order to have that he had to work. In order to work he had to have a work card which he could only obtain as a member of the Franco Youth Group. The 'convenience' the investigator suggests might more accurately have been called 'hunger'. It is interesting to note that the hearing officer completely lost sight of the fact that the alien was arrested and imprisoned for being suspected of being a political enemy of the régime in power in 1947 (after he had joined the Youth Movement). The hearing officer also stated in his summary to the Commissioner:

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'As late as January, 1952, the alien sought the aid of his Government and received a passport from the Spanish Consulate at San Francisco, California so that he would be in a position to secure employment as a seaman. The alien seems to have little difficulty in falling into the good graces of his Government when it suits his convenience.'

"The hearing officer concludes that receiving a passport from the Spanish Government is synonymous with and final evidence of being in the good graces of the Spanish Government. The passport was applied for as the alien explained in order that he might follow his employment as a seaman, and he was unemployable without some official recognition of his nationality.

"It is upon testimony such as this and the summary of the hearing officer that the Commissioner made his Order of July 10, 1952, stating that he did not find that the alien if deported to Spain, would be subjected to physical persecution.

"It should be noted that danger lurks in the practice of submitting a 'summary' to the Commissioner. It permits of the temptation not to read the entire record of the testimony submitted and to rely instead on the $2\frac{1}{4}$ pages of summary instead of the fourteen pages of testimony. One wonders also how $2\frac{1}{4}$ pages can adequately summarize fourteen pages of testimony without omitting important portions. Summarization leads to omissions which in this case were vital ones. Suffice it to say, the hearing officer's statement that the

'alien offers no evidence of a nature that he would be persecuted if returned to Spain'

and his recommendation to the Attorney-General that he make a finding that the alien was not subjected to physical persecution if deported to Spain, is so contrary to a fair evaluation of the testimony at the hearing, which I have read with extreme care, as to indicate an arbitrary and capricious appraisal of the testimony by the hearing officer himself and ultimately by the Commissioner in behalf of the Attorney-General.

"In the case at bar, the evidence supporting the alien's claim is not only his own testimony but, in addition, uncontradicted documentary evidence of the United States Office, Provisional Intergovernmental Committee for the Movement of Migrants from Europe, certifying that he had been determined by the International Refugee Organization to be a Spanish Republican refugee, as well as the certificate of the French Government (the alien had resided in France as a refugee for many years) issued at the request of the International Rescue Committee, certifying that the alien was a Spanish refugee. The probative value of this evidence is strong and convincing.

The evaluation placed upon it by the hearing officer and ultimately by the Commissioner, in behalf of the Attorney-General, to whom the officer reported, was so contrary to the proven facts and to a fair evaluation of the evidence as to amount to a deprivation of due process of law.

"The so-called finding of the Commissioner which ultimately determined the question was contained in an 'Order' and it does not indicate what, if anything, was considered by him in making his ultimate finding. Findings call for a basis or reason for conclusions reached, which do not exist here. Indeed, the form of his statement would suggest that not even a genuine finding was made.

"Judge Dimock of this Court pointed out in *United States of America ex rel. Chen Ping Zee v. Shaughnessy*, D.C., 107 F.Supp. 607:

'In the present state of affairs in the world, it does not seem to me that a person's testimony that he would be subject to persecution in a Communist country can be dismissed so lightly and there is no indication or reason stated in the files or return that would tend to show that these relators would not be subject to persecution.'

"The same cautious attitude applies with equal force to this case."

[Report: 107 F. Supp. 613.]

NOTE.—See, however, *United States ex rel. Mezei v. Shaughnessy*, 195 F. 2d 964, reversed, 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1952). Other cases concerning the expulsion of aliens are: *United States ex rel. Heikkinen v. Gordon*, 190 F. 2d 16 (1951), affirmed, 343 U.S. 945, 72 S. Ct. 1039, 96 L. Ed. 1349, reversed, 344 U.S. 870, 73 S. Ct. 163, 97 L. Ed. 674 (1952); *Lazarescu v. United States*, 104 F. Supp. 771, 199 F. 2d 898 (1952); *Sang Ryup Park v. Barber*, 107 F. Supp. 603, 107 F. Supp. 605 (1952); *United States ex rel. Nereo Dolenz v. Shaughnessy*, 107 F. Supp. 611, 200 F. 2d 288, 345 U.S. 928, 73 S. Ct. 780, 97 L. Ed. 1358 (1952); *Arakas v. Zimmerman*, 200 F. 2d 322 (1952); *United States ex rel. Kaloudis v. Shaughnessy*, 106 F. Supp. 483, 198 F. 2d 568 (1952); *United States ex rel. Strauber v. Shaughnessy*, 107 F. Supp. 399 (1952); *Chavez v. McGranery*, 108 F. Supp. 255, 220 F. 2d 857 (1952); *Martinez v. Neely*, 197 F. 2d 462 (1952), 344 U.S. 916, 73 S. Ct. 345, 97 L. Ed. 707 (1953); and *Latva v. Nicolls*, 106 F. Supp. 658 (1952). In *Latva v. Nicolls*, the Court held (at p. 660): "The initial premise is that under accepted principles of international and domestic law a sovereign has wide discretion in determining how long and under what conditions an alien may remain within the United States. . . . But, by virtue of our Constitution, this power is subject to the due process clause of the Fifth Amendment. . . . And, though there may be some room for a contrary argument, it is my opinion that the Constitution imposes not merely procedural restraints but

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some substantive restraints, such as the First Amendment." See also *United States ex rel. Chen Ping Zee et Al. v. Shaughnessy*, 107 F. Supp. 607 (1952), and *United States ex rel. Camezon v. District Director of Immigration and Naturalization*, 105 F. Supp. 32 (1952).

Case
No. 72

Aliens—Expulsion of—Procedure—The Law of Belgium.

DUPONT *v.* MINISTER OF JUSTICE.

Belgium, Conseil d'État. May 16, 1952.

THE FACTS.—The complainant was a lady of French origin. On November 5, 1949, she married a Belgian national in Belgium. According to the Franco-Belgian Agreement concerning the nationality of married women, of January 9, 1947, she retained her French nationality on marriage only if she had, before marriage, been "regularly" expelled from Belgian territory. Furthermore, it was only if she retained French nationality that measures for her expulsion could be taken after her marriage to a Belgian national. Just before her marriage she signed a printed form, headed "Ministry of Justice—Aliens Department", which stated that she had, received notification of an order for her expulsion in conformity with the Law of September 28, 1939. On the strength of that document she was ordered on February 9, 1950, to leave the country by February 25. She now asked for the annulment of that order, on the ground that she had not received due and proper notification of any measure of expulsion before her marriage to a Belgian national.

Held: that the order of February 9, 1950, must be annulled. The Court said:

"Neither the printed form signed by the complainant, nor any other document on file, show that the complainant was ever able to know what authority had made the order for her expulsion. Moreover, it appears that the letter accompanying that document, signed by a deputizing official, and setting forth confidentially reasons for the expulsion other than those provided for in the Law of September 28, 1939, was not read to the complainant.

"The notification of an expulsion order must show what authority took that measure and specify, if not the actual motive, at least the legal provision relied upon to justify it. The information given to the complainant did not meet these requirements, and thus cannot be regarded as a regular notification in the meaning either of general principles or of Article 1 of the Franco-Belgian Convention of January 9, 1947."

[Report: *Pasicrisie belge* (1953), IV, p. 94.]

Aliens—Expulsion of—Judicial Review—The Law of Belgium. Case No. 73**ALPI v. MINISTER OF JUSTICE.***Belgium, Conseil d'État. July 4, 1952.*

THE FACTS.—The complainant had been resident in Belgium since 1923. During the war he took an active part in the resistance movement. According to police reports dated 1947 and 1948 he was then active as a political propagandist, and was twice asked to cease that activity. On September 5, 1950, he was notified of a ministerial order, dated August 22, 1950, for his expulsion on the ground that his presence in Belgium "is considered to be harmful for the safety of the country". He now asked for the annulment of that decision, and indicated that he had not been informed of the real reasons for it. It was contended on behalf of the Minister of Justice that it was not the function of the Conseil d'État to check the existence or validity of the motives underlying the expulsion order; that the Minister was accordingly not obliged to submit the relevant part of the file to it; and that, furthermore, the file could not be so submitted without serious danger to public order.

Held: that the hearing of the complaint must be postponed, and the Minister of Justice ordered to transmit to the registry of the Conseil d'État all documents in the file demonstrating the lawfulness of the expulsion. The Court said:

"The ministerial order which is being contested is an administrative act taken by an administrative authority on the basis of the Law of September 28, 1939. Appeals against such an act are governed by Article 9 of the Law of December 28, 1946. That Article provided that the Conseil d'État was competent to annul that act 'for violations of substantive formalities or of formalities prescribed on pain of annulment, for excess or abuse of powers'.

"In order to enable the Conseil d'État to exercise its function, Article 13 of the Law of December 13, 1946, laid down that the Government must submit to the administrative section the administrative file concerning cases before that section. A Decree of the Regent of August 23, 1948, provided that this must be done within thirty days from the date of notification of the complaint. The provisions are of general application.

"The Law of September 28, 1939, does not authorize the Minister of Justice to make an expulsion order in the absence of any circumstance capable of justifying such a measure.

"While Article 13 of the Law [of December 23, 1946] does not oblige the Government to reveal information the publication of which would constitute a serious danger for public

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order, that Article does oblige the Government to justify a contested decision before the Conseil d'État. It cannot establish that that act fell within the limits of the Law of September 28, 1939, simply by referring to a motive formulated in general terms in that Act itself."

[Report: *Pasicrisie belge* (1953), IV, p. 138.]

Case
No. 74

Aliens—Expulsion of—Authority Competent to Expel—The Law of Belgium.

ROELS *v.* BELGIAN STATE, MINISTER OF JUSTICE.

Belgium, Conseil d'État. July 8, 1952.

THE FACTS.—The complainant was on December 2, 1950, notified of a decision, dated October 8, 1947, prohibiting him from residing on or re-entering Belgian territory. He asked the Conseil d'État to annul that decision.

Held: that the decision of October 8, 1947, must be annulled. The Court said:

"It is not possible to deduce from the notice of expulsion, signed by the respondent on December 2, 1950, what authority was responsible for the measure. The file does not contain the text of the decision impugned. However, it appears from a letter of June 5, 1951, from the Director-General of the *Sûreté Public* (C.I.D.) that that measure was not taken by the Minister, but 'results from' a proposal 'initialled by the different officials who are authorized to act in the name of the Minister of Justice'.

"The act impugned refers to Article 1, paragraph 2, of the Law of September 28, 1939, concerning the status of aliens. According to that provision, aliens who have entered or reside on Belgian territory without authorization, or aliens whose presence is considered to be harmful or dangerous for the safety or economy of the country, may be expelled by the Minister of Justice. Only the Minister of Justice was thus competent to take the decision impugned. The defending party exceeded its powers by giving the force of a decision of the Minister of Justice to a proposal initialled by officials."

[Report: *Pasicrisie belge* (1953), IV, p. 142.]

D.—EXTRADITION

I.—In General

Extradition—In General—Absence of Extradition Treaty—**Case**
 Principle of Reciprocity—The Law of Venezuela. **No. 75**

In re ALVEZ NOVO.

Venezuela, Federal and Cassation Court. June 3, 1952.

THE FACTS.—Portugal sought the extradition of Joaquín Alvez Novo, who had been convicted on a charge of homicide and had fled to Venezuela under an assumed name. In the absence of a treaty between the two States, extradition was requested on the basis of reciprocity.

Held: that the extradition request must be granted. The Court found that the extradition request conformed to the requirements of the Venezuelan Penal Code and Code of Criminal Procedure. These requirements having been satisfied, under Venezuelan law extradition might proceed "in conformity with the norms established in public treaties", or, in the absence of a treaty, "in accordance with the principles of international law".

[Report: *Gaceta Forense*, Año III, No. 11 (May–August 1952), p. 127.]

NOTE.—See also *In re Carrulla Martí*, decided by the Venezuelan Federal and Cassation Court on June 3, 1952. In that case the Court was asked to rule on the question whether the Government might request the surrender of José Carrulla Martí from Argentina on a charge of swindling. Carrulla Martí and one Alfredo Herrero Romero, Spanish nationals, had allegedly swindled persons out of remittances which they had contracted to send to Spain. Both fled to Chile; and Carrulla Martí was now reported to be in Argentina. There was no extradition treaty with Argentina. It was *held* that the extradition request could proceed. The Court found that although there was no extradition treaty with Argentina, the request conformed to the requirements of Venezuelan law, and said: "Although there is no extradition treaty between Venezuela and the Argentine Republic, according to the principles of international law extradition may be requested on the basis of reciprocity." [Report: *Gaceta Forense*, Año III, No. 11 (May–August 1952), p. 135.]

III.—Conditions of Extradition.

Extraditable Crimes

Case No. 76 Extradition—Conditions of—Extradition Within the British Commonwealth—Whether Fugitive Offenders Act Still Applies Between Republic of India and Great Britain—Political Offences—Whether Applicable to Proceedings Under Fugitive Offenders Act, 1881.

Re GOVERNMENT OF INDIA AND MUBARAK ALI AHMED.

England, High Court of Justice, Queen's Bench Division.

(Lord Goddard C.J.; Parker J.)

April 4, 1952.

THE FACTS.—This was an application for a writ of *habeas corpus*. The applicant, a native of Pakistan, was being tried in India on charges of forgery and fraud when he broke his bail and fled to Pakistan, whence he came to England. He was arrested in England on the application of the Government of India. The applicant argued that the Fugitive Offenders Act, 1881, was no longer of any effect between India and the United Kingdom and that in any case the offence with which he was being charged in India was a political one.

Held: that the application must fail. The Fugitive Offenders Act, 1881, was in force between India and Great Britain on January 26, 1950, when India became a Republic, and it was continued in force by section 1 (1) of the India (Consequential Provisions) Act, 1949, and therefore there was jurisdiction to order the return of the applicant to India.

If the offence with which a man was charged was really political, the Court would apply the same rules under the Fugitive Offenders Act, 1881, as are laid down in section 3 (1) of the Extradition Act, 1870.

Lord Goddard said : " This is a motion for a writ of *habeas corpus* to bring up and discharge the applicant, Mubarak Ali Ahmed, who is at present the subject of an order under the Fugitive Offenders Act, 1881, made by a metropolitan magistrate sitting at Bow Street Magistrate's Court, returning him to India there to take his trial on a charge of forgery. The application is made partly under section 5 of the Fugitive Offenders Act, 1881, which gives a person who has been ordered by a magistrate to be returned the right to apply for a writ of *habeas corpus*, and partly under section 10 of the Act which gives power to a superior court in this country to discharge an offender where, to use the words of the marginal note, the case is frivolous or the return would be unjust.

"The applicant, who claims to be a native of Pakistan, was arrested in the republic of India and was there charged with the offence of forgery and fraud. He was committed for trial, and after the trial had proceeded for two or three days he defaulted on his bail and fled from India. He fled first to Pakistan. We are told—it is not for this Court to go into the matter, because it only concerns Pakistan and India—that it is thought doubtful whether at the present time extradition proceedings lie between Pakistan and India. The applicant did not stay in Pakistan, where he might have been safe. He came to this country and was arrested here, and the only substantial question is whether or not the Fugitive Offenders Act, 1881, still applies as between this country and the republic of India.

"By section 12 of the Fugitive Offenders Act, 1881, that Act could be applied to any of Her Majesty's dominions by an Order in Council, and we were told that an Order in Council was made in 1904 (S.R. & O., 1904, No. 318), applying the Act to India which was then a part of the sovereign's dominions. Until India became an independent republic on January 26, 1950, there was no question that the Act was in force so that its provisions could be applied to a person who was alleged to be a fugitive from India and was arrested in this country. In 1947 Dominion status was conferred on India, and the constitution which had hitherto applied in India no longer applied after January 26, 1950, when India set up its own constitution and became an independent republic, but remained a member of the Commonwealth. It may be—I speak with diffidence—that it is an unusual situation that a republic can be a member of the Commonwealth, but so it is. That is recognized by Her Majesty and this Court takes notice of it, but we need not go into those points because, in anticipation of India becoming a republic, on December 16, 1949, the Imperial Parliament passed the India (Consequential Provisions) Act, 1949.

"The first point made on behalf of the applicant is that the Fugitive Offenders Act, 1881, no longer applies as between this country and India, and, therefore, if a fugitive offender gets to this country from India he cannot be handed over. The answer to that seems to be that by the clear words of the India (Consequential Provisions) Act, 1949, section 1 (1), it is provided that all Acts, rules of law, and so forth, which were in existence at the time when India became a republic, are to remain in force."

His Lordship then cited section 1 and continued: "It seems to me clear that that Act, which was passed in direct contemplation of India becoming a republic within some five weeks of its passing, preserves in force all the laws of this

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country relating to India which were in force at the date of the republic coming into existence. That is the only possible construction which can be put on section 1, and it seems to me extremely likely that the Fugitive Offenders Act, 1881, was one of the Acts which Parliament had in mind when preserving the operation of existing statutory provisions, but we need not consider that. All we have to do is to construe the provisions of the Act of 1949. It is clear that the Fugitive Offenders Act, 1881, was in force as between India and this country at the time when India became a republic, and it remained in force by the joint operation of the Act of 1881 and the Order in Council of 1904 which is still in force. In my opinion, therefore, the Fugitive Offenders Act, 1881, is in full force and effect between this country and India, the magistrate had jurisdiction to inquire into the matter, and there is no complaint to be made on that ground that an order was made.

"Secondly, the application is to this Court as a superior Court under the Fugitive Offenders Act, 1881, section 10. We have allowed fairly full argument on this matter because since the decision of *Amand v. Secretary of State for Home Affairs*, [1943] A.C. 147, it is very doubtful whether any appeal can lie from this Court, the proceeding coming within the definition of a criminal cause or matter. The application to this Court is that the Court refuse to order the fugitive to be given up and it is made under section 10 which provides:

'Where it is made to appear to a superior Court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such Court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the Court seems just.'

"Affidavits have been filed in which it is suggested that the applicant is being persecuted as a political offender. I am quite sure that in a proper case the Court would apply the same rules with regard to applications under the Fugitive Offenders Act, 1881, as it does under section 3 (1) of the Extradition Act, 1870. If it appeared that the offence with which the prisoner was charged was in effect a political offence, no doubt this Court would refuse to return him. The sort of case that has arisen (*e.g.*, *Re Castioni*) is where a man has been charged with murder and it is shown that there was a revolution in

the country where he was and that the alleged murder was committed in the course of the revolution and was regarded as a political matter. In such a case extradition had been refused. The present applicant was standing his trial on a charge of forgery. It may be that, rightly or wrongly—it is a matter into which this Court cannot inquire—he was regarded by the Indian Government as a troublesome political personage who could be dealt with under the Indian Public Security Act, but this Court finds that the applicant was actually on trial in India when he fled. It would be astonishing if in those circumstances this Court said they would not hand him back because it would be unjust or oppressive to do so. He was allowed bail during the course of the trial and broke his bail, and we are now asked to refuse to send him back to India because, it is said, he will not get a fair trial. I think it would be an impossible position for this Court to take up to say that they would not return a person for trial to a country which is a member of the Commonwealth and where it is known that courts of justice have been presided over by Indian judges for very many years because we thought the Court would not give him a fair trial. That would be an insult to the Courts of India. It seems to me that under the words of section 10 of the Act of 1881, wide as they may be, we cannot say that it would be unjust or oppressive to return this man to India to take his trial. For these reasons the Court refuses the application.”

[Report: [1952] 1 All E.R. 1060.]

Extradition—Conditions of—Powers of *Chambre des Mises en Accusation* to Advise against Extradition—Consideration of Guilt. Case No. 77

In re KIBURZ AND BUCHSER.

France, Cour de Cassation. July 10, 1952.

THE FACTS.—In 1950 the Swiss Government requested the extradition of Kiburz and Mrs. Buchser, Swiss nationals, who were charged with fraud, forgery and bigamy. In conformity with the French Extradition Law of March 10, 1927, the request was first submitted to the *Chambre des Mises en Accusation* of the Court of Appeal of the district in which the accused were apprehended, namely, the Court of Appeal of Algiers. That Court found that the offences in question were covered by the Franco-Swiss Extradition Agreement, and that the warrants of arrest related to the persons before it. It nevertheless advised against extradition, on the ground that

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the accused denied the various charges; that they had put forward good reasons for refusing to return to Switzerland; and that Kiburz had shown exemplary conduct in France, where he fought in the Free French Forces for four years. The *Garde des Sceaux* submitted the decision to the *Cour de Cassation* on the ground that the Court of Appeal could not validly find against extradition since it had been found that the legal conditions of extradition were satisfied, and that there was no patent error.

Held: that the decision must be quashed "in the interest of the law". It appeared from Articles 9 and 16 of the Extradition Law of 1927 that the opinion given by the *Chambre des Mises en Accusation* must be unfavourable if the legal conditions for extradition were not satisfied, or if there was patent error. In giving its decision, the Court of Appeal had interpreted these provisions incorrectly.

[Report: *Dalloz hebdomadaire*, 1952, *Jurisprudence*, p. 617.]

Case
No. 78

Extradition—Conditions of—Provision for Extradition of Persons Accused of Collaboration with the Enemy, etc.—Inapplicability to Persons Already Convicted—Political Crimes—Article 45 of Treaty of Peace with Italy, 1947—Extradition Treaty between Italy and Belgium.

Re DE SERCLAES.

Italy, Court of Cassation. May 28, 1952.

THE FACTS.—The extradition of de Serclaes as a collaborator was requested by Belgium pursuant to Article 45 of the Treaty of Peace with Italy, 1947. The request was granted by the Tribunal of Rome. De Serclaes appealed on the grounds that, as he had already been convicted *in absentia* by a Belgian Court, he was not extraditable under the Treaty of Peace as an accused person, and that, because the crime charged was of a political character, he was not extraditable under the Italian-Belgian Extradition Treaty of 1875.

Held: that the appeal must be allowed for the reasons advanced by the appellant. The Court said: "The first thing to be ascertained is whether de Serclaes, who has already been tried and condemned to death on charges of treason and collaboration with the enemy by the War Council of Brussels, has the right to a new trial if he be surrendered to his own country, or whether he is deemed, in terms of Belgian law, to have received his final sentence. If the former, he is still capable of being convicted, and there is therefore no impediment to the application to him of Article 45 of the Treaty of

Peace, whereunder the Belgian Government has requested his extradition and whereby Italy is bound to surrender traitors and collaborators to their own countries for trial. This Court has already decided in this sense: *Re Cartonnet*, decision of May 10, 1950 (*Foro Italiano Repertorio*, 1950, s.v. *Estradizione*, No. 13, etc.). But if de Serclaes is to be regarded as having already been finally convicted, the Belgian Government's request is inadmissible because, as the Court held in the case of *Re Court*,¹ Article 45 of the Treaty of Peace between Italy and the Allied and Associated Powers obliges Italy to surrender only accused persons of the categories specified, not persons already definitively convicted.

"Article 476 of the Belgian Code of Criminal Procedure might appear to dispose of the question. For it is thereby provided that the effect of the arrest or surrender of a person convicted *in absentia* before the term of his sentence has run is to vacate the conviction and that he shall thereupon be re-tried. The appellant is therefore to be regarded as an accused rather than a convicted person within this provision. But this Article of the Code applies only to trials by Courts of Assize. The procedure of War Councils is governed by the Law of June 25, 1921, Article 5 of which required any appeal to be entered within ten days. Article 9 of the Decree-Law of May 26, 1944, later introduced the rule that appeal might be entered against 'any conviction *in absentia* in respect of any of the crimes enumerated in Articles 1 and 2 (*i.e.*, crimes against the State) within six months of notice of such conviction in the case that notification has not been made to the defendant personally and the defendant has no prior actual notice thereof. Where, upon any such conviction, sentence of imprisonment for one year or more is imposed, such conviction and such sentence shall be published as is hereby provided and shall, in the absence of evidence that the defendant had prior actual notice thereof, be deemed to become incapable of appeal upon the expiration of six months from the date on which it is so published.' It is further provided that convictions shall be published in the *Moniteur belge* and either in a newspaper circulating in the province in which a defendant had his last known residence or, failing this, in a national newspaper. And, lastly, the single Article of the Law of November 7, 1946, provided that any person convicted *in absentia*, prior to the enactment of that measure, of a crime against the external security of the State might in certain circumstances enter an appeal as late as December 31, 1946.

"De Serclaes could not claim the benefit of the Law of 1946 because his conviction did not occur before the date of the

¹ *Foro Italiano*, 1952, II, 113.

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latter, sentence having been pronounced in open court on February 11, 1947. Further, the final date provided for by that measure, December 31, 1946, had already passed. Thus only the Decree-Law of 1944 applies to his case. His conviction was published in accordance therewith in No. 264 of the *Moniteur belge* on September 21, 1947, and in the newspaper *La libre Belgique* on June 19, 1947. The six months following publication have now run out. Indeed, the Secretary of the War Council certified on December 10, 1949, that, the time-limit within which an appeal might be instituted having expired, the conviction had acquired the force of *res judicata*. In consequence, de Serclaes must be considered as having been definitively convicted and therefore, for the reasons given by the Court in its earlier decision already cited, is not within the scope of Article 45 of the Treaty of Peace.

" In order to exhaust the matter it must also be investigated whether extradition cannot be granted under treaty stipulations entered into before the entry into force of the Constitution, it being settled law that the exception created by the last paragraph of Article 10 thereof, whereunder the extradition of an alien in respect of political crimes is prohibited, affects only treaties entered into thereafter. Before the war there was in force between Italy and Belgium the Extradition Treaty concluded at Rome on January 15, 1875, which was ratified by the parties on February 25 following, and implemented by Royal Decree No. 2356 of February 28, 1875. This Treaty was originally concluded for a period of five years, subject to automatic renewal for further successive five-year periods failing denunciation by either party six months prior to the expiration of any such period (Article 18). In consequence of the breach of diplomatic relations occasioned by the war, Article 44 of the Treaty of Peace stipulated for the notification, within six months of the date of its entry into force, by each of the Allied and Associated Powers of the bilateral treaties with Italy the revival or maintenance in force of which was required by that Power. By an announcement dated September 14, 1949 (*Le Leggi*, 1949, 818), the Minister for Foreign Affairs intimated that the Belgian Government had communicated its desire to revive or maintain in force the Extradition Treaty of 1875 and, equally, the Supplementary Declaration of March 10, 1879. Thus these two instruments are again in force; the second is of no special relevance, concerned as it is with the expenses of witnesses and the cost of transportation of extradited persons. As to the Treaty of 1875, this, after enumerating the crimes in respect of which the two Governments mutually agree to grant extradition of accused or convicted persons, provides in Article 3 that ' extradition shall

not be granted in respect of political crimes and in no case shall a person who has been surrendered upon any charge be prosecuted for or convicted of any political offence committed before his extradition or in relation to any matter connected with any such offence'.

"To sum up, therefore, since Article 45 of the Treaty of Peace is not applicable in this case, and since the crime charged is a political crime (for all species of treason and collaboration with the enemy must be treated as political crimes since they strike at the international personality of the State: Articles 8 and 241 ff. of the Criminal Code), the request of the Belgian Government cannot be acceded to.

"For these reasons the decision of the Court below is reversed."

[Report: *Foro Italiano*, 1952, 11, 129.]

NOTE.—In *Re Gourges*, decided on April 1, 1952, the Court of Appeals of Rome held that the extradition of war criminals or collaborators under the Treaty of Peace with Italy and Decree-Law No. 363 of February 26, 1948, was permissible only if the charges upon which extradition was requested constituted war crimes or trading or collaboration with the enemy according to the law of the requesting State and the relevant principles of international law. The extradition of a person already convicted of a war crime, as opposed to that of a person charged with such a crime, was to be refused, and the assimilation of the two categories which Article 4 of the Decree-Law purported to effect was improper. Where, however, a person whose extradition was sought had merely been convicted *in absentia* by a court of a country such as France, whose law permits the re-opening of proceedings taken against fugitives *in absentia*, the request was admissible. [Report: *Mass. Foro Italiano*, 1952, 821.]

**Extradition—Extraditable Offences—Political Offences— Case
Killing of Political Opponents—Killing of a Fascist in Italy No. 79
after the Collapse of the Fascist Régime.**

In re PERUZZO.

Switzerland, Federal Tribunal.

January 24, 1951.

THE FACTS.—This was a request by the Italian Government for the extradition of one Peruzzo, an Italian national, who was charged with incitement to, or complicity in, the homicide of one Lorenzo Cappello in December 1945. It was contended on behalf of the accused, first, that there was no evidence that he was in any way connected with the offence in question and, secondly, that in any case the offence was political in nature, since Cappello was a dangerous Fascist, and that extradition

therefore must not be granted in respect of that offence. Other relevant facts are stated in the *Held* below.

Held: that extradition must be granted. There was *prima facie* evidence against the accused; his guilt did not fall to be decided; and the offence was not political in nature. It could not be said that in the circumstances of the time homicide was the *ultima ratio* to achieve a political end. The Court said, in part:

“ It is a general rule, repeatedly affirmed by this Court, that the question of guilt can neither be examined nor decided by the courts of the requested State.

“ The question whether the Federal Tribunal must consider this when the evidence against the accused is manifestly inconsistent and, therefore, clearly unfounded, need not be decided. This is not, in fact, the case here. . . .

“ The qualification of the offence is of interest to the Federal Tribunal only for the purpose of determining whether it is an extraditable offence. The question may be left undecided whether it can interfere when the qualification of the offence made by the Court of the requesting State is clearly erroneous. . . .

“ Article 3 of the Italian-Swiss Treaty and Article 10 of the Federal Extradition Law provide that extradition shall not be granted for a political offence.

“ There is no doubt that the present offence is not a political offence in the strict sense of the words, *i.e.*, an offence which consists in direct revolt against the State and its fundamental institutions (such as high treason, revolt, etc.). But the question arises whether it must be considered to be a relative political offence, *i.e.*, an offence which, while having the characteristics of a common offence, acquires political character by the motive inspiring it, by the purpose for which, or the circumstances in which, it is committed; in other words, whether it is an offence which, while in itself a common offence, has a predominantly political character.

“ (a) In December 1945 the war in Italy was over; hostilities had ended in the spring, when American forces occupied Italian territory. Italy had a Government of national unity, comprising all parties (even the Communist), which effectively exercised its authority over the whole of Italian territory. It does not appear that in such conditions a struggle for power could break out and the fascist movement reconquer power.

“ (b) Even if it is admitted that there were still remnants of a political struggle, and that the political purpose in this case was to prevent a return of the fascist régime or the

constitution of a fascist opposition to the new Government, it cannot be admitted that the relation between the end sought and the homicide of Lorenzo Cappello was sufficient to make it possible for that homicide to be described as political.

"At that period there existed in Italy ordinary courts and even extraordinary tribunals. . . . If it was really thought that Cappello was a fascist who was dangerous to the State, steps could have been taken other than his assassination. The matter could have been brought to the attention of the competent authorities. In these circumstances, homicide was not the *ultima ratio* to achieve a political end.

"It must be concluded that the act with which the accused is charged does not have a political character and is not excusable for political reasons to such an extent as to make the accused worthy of the right of asylum."

[Report: *Arrêts du Tribunal Fédéral Suisse*, 77 (1951), p. 50.]

Extradition—Conditions of—Territoriality of Offence—Extraditable Offences—Political Offences—Right of Asylum. **Case No. 80**

In re KAVIC, BJELANOVIC AND ARSENIJEVIC.

Switzerland, Federal Tribunal.

April 30, 1952.

THE FACTS.—This was a request by Yugoslavia for the extradition of three Yugoslav nationals, members of the crew of a Yugoslav passenger plane, who had diverted the plane from its lawful destination in Yugoslavia to Switzerland, and had there sought asylum. During the flight the other members of the crew were subjected to constraint, and extradition was requested for that offence as well as for the offences of endangering the safety of public transport and of wrongful appropriation of property. It was contended on behalf of the accused that extradition should be refused on the grounds, *inter alia*, that the offence was not committed on Yugoslav territory, and that it was a political offence.

Held: that extradition could not be granted. The offences in question had a political character. The Court said, in part:

"The question whether the request for extradition must be granted, must be decided in conformity with the Federal Law concerning Extradition of January 22, 1892, and the Extradition Treaty between Switzerland and Serbia of November 28, 1897, since the Kingdom of Yugoslavia and now the Federal Republic of Yugoslavia are the successors of the Kingdom of Serbia, and have taken over international conventions concluded by it. . . .

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No. 80
Contd.

"The accused contend that, according to the principle of territoriality, extradition cannot be granted, since the offences in question were not committed on or over Yugoslav territory, but on or over that of Switzerland, and of Austria and Italy. . . .

"(a) This contention is unfounded in so far as it is attempted to deduce from the preamble to Article 1 of the Extradition Treaty that extradition can be granted only for offences committed in Yugoslavia. An earlier decision of this Tribunal (*A.T.F.*, 34, I, p. 781) taking this view in reference to an identical provision in the Swiss-Italian Extradition Treaty, was essentially based on the fact of the lack of competence of Italian courts to deal with offences committed outside Italy. Yugoslav law, on the other hand, provides for the competence of Yugoslav courts also in respect of offences committed by Yugoslav nationals abroad, if the offender is arrested in Yugoslavia, or extradited. . . .

"(b) On the other hand, the question arises whether extradition must not be refused on the ground that the offences in question were committed on Swiss territory, to which, both according to international and to municipal law, the airspace above it belongs (Article 1 of the Convention of December 7, 1944, concerning International Civil Aviation; and Article 11, paragraph 1, of the Federal Law concerning Aviation of December 21, 1948). The principle that extradition is not granted for offences committed on Swiss territory is laid down in Article 12 of the Extradition Law; it is valid even in relation to States with whom an extradition treaty is in force which does not contain that principle. It applies not only to offences committed exclusively in Switzerland, but also to offences committed both in Switzerland and in the requesting State, *e.g.* when the action was carried out in Switzerland and had its effect in the other State, or when acts committed in both countries are considered by criminal law to form one entity. The question whether extradition must be denied on this ground can, however, be left open, since, as will be seen below, it is excluded on another ground.

"In accordance with Article 10 of the Extradition Law and Article VI of the Extradition Treaty, extradition is not granted for political offences. This applies not only to offences directed against the State, which are described as purely political offences—and which, in any case, are not amongst the extraditable offences listed—but also to so-called relative political offences, which consist in the commission of a common offence, but which, by virtue of the circumstances and, in particular, the motive, of their commission, acquire a political colouring. Moreover, there are common offences which are committed

not for their own sake, but for the purpose of preparing or ensuring the success of purely political offences, and common offences which also constitute a purely political offence (*Idealkonkurrenz*). . . .

“(a) All the offences with which the accused are charged were means to effectuate their escape abroad, and coincided completely with that escape. The question must therefore be examined whether that escape constituted a purely political offence; if so, extradition must be refused on the ground that the offences for which it is requested are not only connected with a purely political offence, but also constitute such an offence (*Idealkonkurrenz*). . . . [The Court then examined Yugoslav legislation concerning the illegal crossing of its frontiers, and came to the conclusion that the escape did not constitute a purely political offence.]

“(b) The purpose and motive of the acts with which the accused are charged was to enable them to flee from a country with whose régime they were not in agreement and where they felt themselves to be watched and repressed. . . . This fact gives both the flight and the offences committed to make it possible a distinctly political colouring.

“That is not, however, enough to exclude the possibility of extradition for these offences; it is also necessary that their political character should outweigh their common characteristics. At the time of the adoption of the Extradition Law it was decided, after long discussion, not to define the concept of relative political offences, but to leave the Court to appreciate the character of an offence by reference to all the circumstances (Message of the Federal Council of June 9, 1890; BBl, 1890, III, p. 352). The earlier jurisprudence of the Federal Tribunal laid decisive emphasis on the basic idea of the Law, namely, that asylum should be granted to the alien worthy of sympathy, who had fought for his political convictions and had been prosecuted for so doing (*A.T.F.*, 32, I, p. 539). Later, the Tribunal gave a more restrictive interpretation to the concept of relative political offences, and required, in particular, that the act should be related to a general activity directly aimed at the realization of political aims, and should have been committed in the framework of a fight for political power (*A.T.F.*, 59, I, p. 146; *ibid.*, 77, I, p. 62). This applies to the flight of a political opponent from the country only if it is intended to continue the fight for power from abroad. . . . That restrictive interpretation does not, however, bear re-examination: it does not meet the intention of the law, nor take account of recent historical developments, such as the growth of totalitarian States. In such States all political opposition is suppressed and a fight for power is, if not impossible from the start, at least

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Contd.

practically without any chance of success. Those who do not wish to submit to the régime have no alternative but to escape it by flight abroad. . . . This more passive attitude for the purpose of escaping political constraint is no less worthy of asylum than active participation in the fight for political power used to be in what were earlier considered to be normal circumstances. The spirit of justice undoubtedly ascribes a political character to such a flight abroad, and a liberalization of the practice of the Court, with a view to adjusting it to recent developments, appears justified. In matters of extradition in particular, the Court must not abandon that spirit in favour of legalistic constructions, and must take account of historical and political developments; in the Message of the Federal Council cited above the competence of the Federal Tribunal and its freedom of appreciation is explained on the ground that it offered 'the best guarantee that the decision would always reflect the sentiment of justice inherent in the people, and would not be prejudiced by considerations alien to the realm of law'. Recent practice has been too restrictive in making the relative political character of an offence dependent on its commission in the framework of a fight for power. Such a character must also be attributed to offences which were committed in order to escape the constraint of a State which makes all opposition and, therefore, the fight for power impossible.

"In this connection there can also be applied the principle that the relation between the purpose and the means adopted for its achievement must be such that the ideals connected with the purpose are sufficiently strong to excuse, if not justify, the injury to private property, and to make the offender appear worthy of asylum (*A.T.F.*, 56, I, p. 462). Freedom from the constraint of a totalitarian State must be regarded as an ideal in this sense. In the present case the required relationship undoubtedly exists; for, on the one hand, the offences against the other members of the crew were not very serious, and, on the other, the political freedom and even existence of the accused was at stake, and could only be achieved through the commission of these offences."

[Report: *Arrêts du Tribunal Fédéral Suisse*, 78 (1952), I, p. 39.]

Extradition—Extraditable Offences—Political Offences— Case
Grant of Extradition in Respect of Robbery—Refusal of No. 81
Extradition in Respect of Carrying Arms without Licence.

In re NAPPI.

Switzerland, Federal Tribunal.

January 23, 1952.

THE FACTS.—This was a request by the Italian Government for the extradition of one Nappi, an Italian national, who was charged with having, in June 1948, when a member of a neo-fascist group named "Group R", carried arms without a licence and participated in the armed robbery of the branch of the Bank of Naples at Caivano. It was argued on behalf of the accused that the carrying of arms without a licence was not an extraditable offence, and that the robbery was carried out for political ends, namely, the purposes of "Group R", and was therefore not extraditable.

Held: that extradition could be granted for the robbery. It could not be granted for the carrying of arms without a licence, and Nappi must accordingly not be punished for that offence. The Court said:

"The carrying of arms without a licence is not a crime under the Italo-Swiss Extradition Treaty or by Swiss legislation. . . .

"So far as the crime of robbery is concerned . . . the accused contends that he did not act in his personal interest, but in that of the political 'Group R' to which he belonged, and that his offence was thus political in character.

"Article 3 of the Italo-Swiss Treaty and Article 10 of the Federal Extradition Law provide that extradition shall not be granted in respect of political offences. Since robbery is a common offence, the objection raised by the accused amounts to saying that, in the circumstances of the case, it is a relative political offence, *i.e.* an offence which, while having the characteristics of a common crime, acquired political character by virtue of the motive inspiring it, the purpose for which or the circumstances in which it was committed; in other words, it is a common offence with a predominantly political character.

"(a) In the present case the political motive is clearly established by the judgment of the Court of Assize of Naples. It can thus be admitted that Nappi's motives were political; in other words, he acted in the exclusive interest of 'Group R' to which he belonged, and without any personal aims.

"(b) According to Nappi, 'Group R' pursued a political purpose, which was the changing of the political and social order in Italy. Even if that is so, it must be observed that

**Case
No. 81
Contd.**

according to the jurisprudence of the Federal Tribunal (*A.T.F.*, 54, I, p. 213) the political character of an offence is predominant only if the offence is in direct relation to the end sought. In order that such a relation may exist, this offence must be a really efficacious method of achieving the end, or constitute an integral part of acts leading thereto, or represent an incident in a general political movement in which the parties have recourse to such methods.

"Even admitting that the aim of 'Group R' was to seize power in Italy, the link between the robbery of the branch of the Bank of Naples in Caivano and the overthrow of the régime of the Italian Republic appears too tenuous. In the case of *Meilhoe* (unpublished decision of July 14, 1949), the Federal Tribunal decided that theft was not a directly efficacious method for bringing about the overthrow of the régime. That applies also to robbery, particularly in view of the fact that the sum stolen, some 2½ million lire, could certainly not finance a serious movement against the State. Moreover, there is no evidence that in June 1948 'Group R', to which Nappi belonged, was preparing for action. On the other hand, it is not established that the bank robbery formed an integral part of acts designed to achieve the political purpose of 'Group R' and was thus an incident in the course of a general political movement."

[Report: *Arrêts du Tribunal Fédéral Suisse*, 78 (1952), p. 123.]

**Case
No. 82**

Extradition—Conditions of—Principle of Speciality—The Law of Argentina.

In re COSTA.

Argentina, Court of Second Instance, Buenos Aires.

June 17, 1952.

Mariano Costa, an Italian national, appealed against an order made by the Court of first instance for his extradition to Italy on a charge of swindling (*estafa agravada*), pleading that under the terms of the Extradition Treaty of June 16, 1886, between Argentina and Italy, he could not be surrendered because swindling was not listed among the extraditable offences. The Treaty did list, however, the offence of fraud (*estelionato*). The Court of second instance found that the extradition request was in conformity with the provisions of the Treaty and the Argentine Code of Criminal Procedure, and that the offences of swindling and fraud were sufficiently similar to warrant extradition.

[Report: *Revista Jurídica Argentina La Ley*, Vol. 68 (October-December 1952), p. 328.]

Extradition—Conditions of—Principle of Speciality—The Law of Venezuela—The Bustamante Code. **Case No. 83**

In re DILASSER.

Venezuela, Federal and Cassation Court.

July 30, 1952.

THE FACTS.—On March 27, 1951, the Federal and Cassation Court authorized the extradition to France of Henri Auguste Dilasser, a French national, and Alexis Belostoski, a native of Russia.¹ The French authorities now requested that Venezuela permit the revision of the charges against Dilasser, so that he might be tried for an offence distinct from that on which extradition had been based. The earlier charges against Dilasser and Belostoski were of swindling and being an accessory thereto. The revised charge against Dilasser was one of swindling and fraud. In the absence of an extradition treaty between Venezuela and France, extradition was granted earlier on the basis of reciprocity.

Held: that revision of the charges contained in the extradition request must be refused. A person may be tried only on the charges which form the basis of the extradition request, unless there is specific agreement to the contrary. The Court said in part:

“In certain treaties, such as those concluded with Italy and Brazil, among others, Venezuela has agreed that the parties may request the extension of the charges upon which extradition was originally conceded; however, such extension has been subject to conditions established in the respective Treaties. There is no extradition treaty between Venezuela and France. The one which was signed at Caracas on May 23, 1853, and ratified in 1856, was denounced and terminated in November 1870; furthermore, it did not include specific provisions concerning the extension of extradition.

“Given this situation, we must now examine the principles of international law governing the subject under consideration. There is a rule, dominant in doctrine, in international practice, and as a principle vigorously defended by publicists, that a person may be tried only for the offence for which he was extradited unless it has been agreed otherwise. Nor may a person be tried for other offences antedating extradition, save where the individual has freely consented to such action, where he has been acquitted of the offence giving rise to extradition, or where, having been convicted and having served his sentence,

¹ See *Re Dilasser et Al.*: *Gaceta Forense*, Año II, No. 7 (April 1952), p. 150; *International Law Reports*, 1951, Case No. 99.

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Contd.

the person has maintained his residence for some time in the country in which he was tried.

"Venezuela has traditionally supported the above position. It has been precisely stated in extradition treaties concluded with Belgium in 1885, Spain in 1894, the Bolivarian Republics in 1911, Cuba in 1912, and the United States of America in 1922. Moreover, the same principle is expressly stated in Article 377 of the Bustamante Code or Code of Private International Law, which has been adopted as the law of the Republic. Although it is true that the provisions of the Bustamante Code are obligatory only for the signatory States, nevertheless there can be no doubt that the above principle contained therein is binding on this country and that, in the absence of treaty provisions to the contrary, it must be respected by this country."

[Report: *Gaceta Forense*, Año III, No. 11 (May-August 1952), p. 201.]

Case
No. 84

Extradition—Conditions of—Time of Offence and Time of Request—The Law of Venezuela.

In re ROMAGUERA DE MOUZA.

Venezuela, Federal and Cassation Court.

July 23, 1952.

THE FACTS.—Spain sought the extradition of Antonio Romageura de Mouza, alias Juan Monzo Ortiz, on a charge of larceny. Spain and Venezuela were bound by an Extradition Treaty of January 22, 1894. Romaguera pleaded in his defence that his real name was Monzo, that he was a Venezuelan national and therefore not liable to extradition, that the Treaty did not provide for extradition on a general charge of larceny, that the alleged offence had a political character because it took place in 1939 during the Spanish Civil War, and that the charge was void by reason of lapse of time.

Held: that the extradition request must be refused. The Court found on examination of Article III of the Treaty and pertinent provisions of the Penal Code that extradition could not be granted where the time elapsing between the commission of the alleged offence and the submission of the extradition request exceeded the statutory limit for that offence in the State of asylum. As the decision rested on this point, the Court did not consider the other pleas offered by the defence.

[Report: *Gaceta Forense*, Año III, No. 11 (May-August 1952), p. 193.]

Extradition—Conditions of—Competence of Requesting Authority to Request Extradition.

See Case No. 86 (*In re Wyrobnik*).

IV.—Procedure of Extradition

Extradition—Procedure of—Preliminary Examination of the Charge—The Law of Venezuela. **Case No. 85**

In re CORONADO *ET AL.*

Venezuela, Federal and Cassation Court.

January 18, 1952.

THE FACTS.—Colombia sought the extradition of Pedro Luis Coronado and Víctor Vargas Gutiérrez, Colombian nationals, on charges of homicide, robbery and other offences. Colombia and Venezuela were bound by the Bolivarian Treaty of Extradition of 1911. A political element attached to the charges because the acts charged took place during a period of civil strife in Colombia.

Held: that extradition must be refused. On examining the proofs submitted by Colombia with the extradition request, the Court was not satisfied of the identification of the fugitives with the commission of the alleged offences, nor with the credibility of the witnesses, especially in view of the disturbed state of affairs in Colombia at the time when the acts took place. For these reasons, the extradition request was denied.

[Report: *Gaceta Forense*, Año III, No. 10 (January-April 1952), p. 54.]

V.—Political Crimes

Extradition—Political Offences—Offences against Exchange Regulations—Procedure of Extradition—Conditions of—Question of Competence of Requesting Authority to Request Extradition. **Case No. 86**

In re WYROBNIK.

Switzerland, Federal Tribunal.

September 24, 1952.

THE FACTS.—This was a request by the Minister of Justice of Baden-Württemberg (German Federal Republic), for the extradition of one Gustav Wyrobnik, a Polish national. Wyrobnik was charged with having unlawfully acquired dollar-scripts and having unlawfully exchanged them for

Case
No. 86
Contd.

travellers cheques, signing the latter with false names. Extradition was not requested for the offences against the exchange regulations, but for the forgery involved in the transactions. It was argued on behalf of Wyrobnik, first, that the offence in question fell within the competence of the American authorities of occupation and that the German authorities were accordingly not competent to ask for extradition; and, secondly, that the facts did not constitute an independent offence of forgery, and that the only offences committed were those against the exchange regulations, which could not give rise to extradition.

Held: that extradition must be granted, with the reservation that offences against the exchange regulations must not be taken into consideration in the prosecution of Wyrobnik. The Court was not competent to inquire into the competence of the requesting authorities to ask for extradition. The offence of forgery was not so connected with the offences against the exchange regulations that extradition must be refused. The Court said, in part:

"It is for the Federal Council to decide whether a request for extradition complies in form with the requirements of treaty or law. The Federal Tribunal therefore does not have to deal with the question whether the present request has been made by the competent authority, or whether the warrant attached to it was issued by a competent organ. Similarly, it is not for the Federal Tribunal to examine whether the court before which the person extradited is to be tried has jurisdiction under the law of the requesting State; the only argument which could be taken into consideration would be that that court was a tribunal with special powers (*Ausnahmegericht*). . . .

"The Federal Tribunal is also not competent to decide the question of guilt. Extradition is granted on the basis of the facts alleged in the indictment attached to the request for extradition. . . .

"Extradition to Germany must be granted if the acts for which the warrant was issued are punishable under both Swiss and German law, and satisfy the definition of an offence covered by the Extradition Treaty. [The Tribunal then examined the question whether the acts with which the accused was charged constituted the offence of forgery both under German and under Swiss law, and found that it did.]

"There remains the argument that the forgery was not an independent legal act, but merely part of an offence against the exchange regulations, for which extradition cannot be granted:

"(a) On the basis of the provision prohibiting extradition for political offences (Article 10 of the Extradition Law), the

Federal Tribunal refuses extradition also for common offences where these are committed not for their own sake, but for the purpose of preparing or ensuring the success of a purely political offence, or when the act also constitutes a political offence. These principles, which were established by reference to the peculiar nature of political offences, cannot be applied to the relationship between extraditable and non-extraditable offences in general. When an extraditable offence is connected with, or also constitutes, a fiscal, military or other non-extraditable offence, extradition is granted for the extraditable offence subject to the reservation that the non-extraditable offence must neither be punished nor constitute a ground for increasing the severity of the penalty. A different attitude has been adopted solely where the non-extraditable offence covers the extraditable offence in all respects so that the latter is absorbed in the former. And the Federal Tribunal has refused extradition for an offence which constituted an extraditable offence (fraud) according to the law of the requesting State, but was considered by Swiss law to be a fiscal offence. . . . ”

[Report: *Arrêts du Tribunal Fédéral Suisse*, 78 (1952), I, p. 235.]

Extradition—Political Offences—Collaboration with the Enemy.

See Case No. 78 (*Re de Serclaes*).

Extradition—Political Offences—Right of Asylum—The Law of Switzerland.

See Case No. 80 (*In re Kavic, Bjelanovic and Arsenijevic*).

PART VII

**DIPLOMATIC AND CONSULAR
INTERCOURSE AND PRIVILEGES**

A—PERMANENT DIPLOMATIC ENVOYS

III.—Privileges and Immunities of

i.—Diplomatic Envoys and their Staff

Case No. 87 **Diplomatic Immunity—Waiver of—Failure to Answer Communications—Whether Amounting to Refusal to Submit to Jurisdiction—The Law of Argentina.**

In re SCARPONI *ET AL.*

Argentina, Supreme Court. May 5, 1952.

THE FACTS.—The Chilean Ambassador had been asked several times to permit the appearance of Bruno Scarponi and Fernando Tisne Brousse, Naval Attaché and Air Attaché, respectively, at the Chilean Embassy, to answer charges in penal proceedings. The Procurator General submitted the opinion to the Court that the continued failure of the Ambassador to reply to these communications raised the presumption that he had refused to submit to the jurisdiction.

Held: that refusal of the head of a diplomatic mission to acknowledge official communications may not be construed as a refusal to submit to the jurisdiction. The Court said:

“Immunity from the jurisdiction of national courts is inherent in the nature of diplomatic representation and is expressly recognized in our national legislation.¹ As this immunity is a right which may be exercised or renounced by the respective foreign Government, it follows that immunity is not automatic but involves consent.

“The Ministry of Foreign Relations should notify the Ambassador of the Republic of Chile of the initiation of the present proceedings, to which he may answer as he deems convenient. To interpret the failure of the Ambassador to acknowledge official communications as a negative answer would be to admit the automatic nature of diplomatic immunity and to modify the jurisdiction which is granted in express terms to this Court by the National Constitution.²

¹ Article 1, Law 48; Article 24, Law 13,998: *Anales de Legislación Argentina*, X-A, p. 221.

² Article 96 provides that the original jurisdiction of the Supreme Court extends to cases involving ambassadors, ministers, and foreign consuls.

"Notwithstanding the absence of any reply and the time which has elapsed, these proceedings should be continued and a copy of this order be sent to the Executive branch for transmission to the diplomatic representative of the Republic of Chile."

[Report: *Fallos de la Corte Suprema*, Vol. 222, p. 410.]

Diplomatic Immunity—Renunciation of—Request that Immunity be Waived—Whether Amounting to Violation of Diplomatic Privilege—The Law of Chile—The Bustamante Code. **Case No. 88**

MINISTER OF BELGIUM *v.* JUDGE OF SECOND COURT OF FIRST INSTANCE IN CIVIL MATTERS OF SANTIAGO.

Chile, Supreme Court. March 22, 1952.

THE FACTS.—An action to recover rent in arrears was brought by Gerhard Smid against Albert Uyttenhove, former Secretary of the Belgian Legation. On December 7, 1951, the Judge of the Second Court of First Instance in Civil Matters of Santiago sent a communication to the Minister of Belgium asking him, if he deemed it appropriate, to inquire whether the Belgian Government would authorize the withdrawal of the privilege of diplomatic immunity from Uyttenhove so that he could appear in court. The Minister forwarded the Judge's communication to the Chilean Ministry of Foreign Relations together with a note alleging violation of his diplomatic immunity and demanding that disciplinary measures be taken against the persons responsible. The Minister of Foreign Relations replied that the complaint of the Belgian Minister was justified, and agreed that the Judge had acted beyond his authority. In response to a request from the Supreme Court for an explanation, the Judge defended his action, stating that nothing derogatory had been intended nor could be concluded from the enquiry which he had addressed to the Belgian Minister and pointing out that European diplomats in Chile enjoy privileges and immunities on the basis of custom, as the Bustamante Code of 1928 to which Chile is party binds only Latin-American States and could be applied to non-American States only as a matter of practice. The controversy was referred to the Fiscal of the Supreme Court for a report on the merits. On March 22, 1952, the Supreme Court, announcing that it adopted the opinion of the Fiscal,

Held: that the Ministry of Foreign Relations constituted the appropriate channel for approach to heads of diplomatic missions by Government officials. It was not a violation of diplomatic privilege for authorities of a State to request that

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the head of a diplomatic mission ask his Government to withdraw the diplomatic immunity of a member of the mission, so that the latter might appear as defendant in a civil suit.

The Fiscal, having discussed with much erudition the theory and practice of diplomatic immunity, said: "In short, when diplomatic functionaries enter into contracts in their private capacity, without regard to their status as public representatives, the local courts may take jurisdiction over the matter.

"These principles [concerning diplomatic immunity] are incorporated in Articles 333 *et seq.* of the Code of International Private Law or Bustamante Code, signed at Habana on February 20, 1928, ratified by Chile on September 6, 1933, and promulgated as law by Decree No. 374 of April 10, 1934. Although the provisions of the Code of Private International Law are binding only on the American States which have ratified it, nevertheless they may be considered as real and definitive principles of international law which may properly be applied in situations arising in Chile regarding the diplomatic agents of non-American States.

"In the course of this report it has been clearly shown that in accordance with the principles of international law, Governments may renounce the immunity of their diplomatic agents from civil jurisdiction, thereby placing them under the jurisdiction of the local courts.

"The only criticism which may be made against the Judge concerns procedure, in that he should not have approached the Minister of Belgium direct, but rather through the agency of the Ministry of Foreign Relations. On the other hand, when the Belgian Minister takes the position that the Judge, in asking him to request certain information from his Government, has committed 'a grave violation of diplomatic immunities', he fails to understand either the content or the object of the Judge's communication. The conclusions reached by the Ministry of Foreign Relations indicate that our Chancellery has also understood only imperfectly the content and object of the Judge's letter.

"The Judge asked the Belgian Minister, in respectful terms, 'at his discretion to request His Majesty's Government for the necessary authorization for the withdrawal of the diplomatic immunity enjoyed by the ex-Secretary of Legation, Albert Uyttenhove'. This enquiry cannot be construed, in any sense, as subjecting the Belgian Minister to the jurisdiction of the Court. It is only a petition directed to the diplomatic agent, on which he could act or not as he chose. The Judge did not seek to force the Minister to any decision, but limited himself to asking the Minister, at his discretion, to consult his Government on the matter.

“The Minister of Foreign Relations asserts that ‘the Judge lacks the competence to issue orders affecting persons who enjoy immunity from jurisdiction according to international law’. If the Minister of Foreign Relations had fully understood the content of the communication sent by the Judge of the Court of first instance to the Belgian diplomat, he would have realized that the Court did not, at any time, assume competence to issue orders having a controlling effect on persons who enjoy diplomatic immunity. On the contrary, the Minister of Foreign Relations would have observed that the Judge communicated with the Belgian Minister precisely because he recognized that the Court could not take jurisdiction over the matter in which M. Uyttenhove was involved. In spite of the fact that some question may be raised as to whether diplomatic immunity may properly be invoked by the ex-Secretary of Legation in the matter under dispute, the Judge granted that he had immunity and thereby recognized that the Court lacked jurisdiction over the case.”

[Report: *Revista de Derecho* [Universidad de Concepción], 20 (1952), p. 471.]

Diplomatic Immunity—Immunity from Civil Jurisdiction—Availability of Plea in Action against Sending State—The Law of Italy.

See Case No. 43 (*Castiglioni v. Federal People's Republic of Yugoslavia*).

ii.—Subordinate Members of the Diplomatic Staff

Diplomatic Immunities—Subordinate Officials—Couriers—Immunities of.

See Case No. 94 (*Juan Ysmael & Co. v. S.S. Tasikmalaja*).

iii.—The Family and Retinue of Diplomatic Envoys

Diplomatic Privileges and Immunities—Immunities of Wife of Diplomat—Immunities of Delegates to the United Nations. **Case No. 89**

PEOPLE *v.* VON OTTER.

United States, City Court of New Rochelle, New York.
July 30, 1952.

THE FACTS.—The defendant, the wife of the Counsellor of Legation of the Swedish Delegation to the United Nations, was charged with wilfully and unlawfully parking her motor vehicle in violation of the traffic code. She pleaded “absolute and unconditional immunity”.

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Held: that the defendant was entitled to diplomatic privileges and immunities, and must therefore be discharged. The Court said:

" This question of immunity was first presented for decision to this very Court before Honorable Sol Rubin, the then Acting City Judge, in the matter of the *County of Westchester on Complaint of Donnelly v. Ranollo*, 187 Misc. 777, 69 N.Y.S. 2d 31, 35, the chauffeur of the Honorable Trygve Lie, Secretary General of the United Nations, who claimed such immunity for himself, when charged with violating the Vehicle and Traffic Law on a County highway within this City.

" Judge Rubin in reviewing the pertinent Treaties and Congressional Acts in the *Ranollo* case held that under the then terms there was no such right of absolute immunity and the determination of a question of fact was necessary in each case before the claim of immunity could be allowed. The Court in the *Ranollo* case then made the following recommendations:

' This Court feels strongly that the question of immunity under these circumstances should be entrusted, not to the whim or caprice of any individual or committee that might speak for the United Nations Organization, but rather that such immunity should be available only when it is truly necessary to assure the proper deliberations of the Organization—a circumstance that could be readily brought about if the granting of immunity were restricted to those cases where our own State Department certified that the exemption from prosecution or suit was in the public interest.'

" Thereafter, and apparently conforming to the suggestions so made, the Congress enacted Public Law 357, 80th Congress, 61 Stat. 756, which, among other things, provides by section 15 thereof, that the limited category of United Nations personnel therein specifically identified, ' shall . . . be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it '.

" In pursuance of the new Legislative approach to the problem a specific list of United Nations personnel are recognized by the Department of State as entitled to diplomatic privileges and immunities under the provisions of Public Law 357 and identification cards have been issued by the Department of State to the delegation officers and personnel so specifically listed."

" The defendant in this case, as the wife of Baron von Otter, has been so specifically certified, and therefore is unquestionably entitled to diplomatic privileges and immunities under Public Law 357."

[Reports: 202 Misc. 901; 114 N.Y.S. 2d 295.]

NOTE.—In *American League for a Free Palestine, Inc. v. Tyre Shipping Co., Inc.* (1952), 202 Misc. 831, 119 N.Y.S. 2d 860, affirmed without opinion, 281 A.D. 655, 117 N.Y.S. 2d 655, the Supreme Court, Special Term, New York County, *held*: “While a consular officer is not exempt from being called as a witness he may not be required to testify concerning the contents of the consular archives nor to divulge information, which has come to him in his official capacity. See 4 Hackworth, Digest of International Law, section 437, p. 753 *et seq.*; 5 Moore, International Law Digest, § 714, pp. 84, 85.” Diplomatic immunity was not accorded to the wife of a Commercial Attaché of Italy; see *Reyes v. Egidi*; *New York Law Journal*, October 23, 1952, p. 919, 281 A.D. 862 (1953).

Where the Royal Consul-General of Sweden appeared in a testamentary proceeding *ex officio* for contestants who resided in Sweden, the Court denied a motion by proponents of the will that the Consul be required to provide security for costs for reasons of “protocol and comity”: see *In re Ericson's Will* (1951), 105 N.Y.S. 2d 336, 200 Misc. 216.

Diplomatic Privileges and Immunities—Immunities of a Personal Servant of a Diplomat—Necessity for Notification of Name—Statement of Executive Department—Binding Force of. Case No. 90

HALEY *v.* STATE.

United States, Court of Appeals of Maryland.
May 7, 1952.

THE FACTS.—Defendant, an American citizen, was convicted of a crime, and, on appeal, raised for the first time the defence of diplomatic immunity, on the ground that he was the personal servant of the Air Attaché of the Swedish Embassy. With the motion for a new trial were filed letters from the Minister-Counsellor of the Embassy of Sweden attesting to the status of the Air Attaché and to the fact that the defendant was his personal servant, and from the Air Attaché requesting that “the rights and privileges enjoyed by personal servants to foreign diplomats” be extended to the defendant. The Chief of Protocol of the Department of State wrote to the Court that it was the Department’s opinion that the defendant “does not have immunity under the sections of Federal law. . . . for the reason that there had been no official notification to the United States of any diplomatic status” of the defendant.

Held: that the defendant was not entitled to diplomatic immunity, and the judgment must be affirmed. The Court said:

“Appellant claims diplomatic immunity under Title 22 U.S.C.A. sections 252–254, which read as follows:

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‘ 252. *Suits against ministers and their domestics prohibited.*

Whenever any writ or process is sued out or prosecuted by any person in any Court of the United States, or of a State, or by any judge or justice, whereby the person of any ambassador or public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void. R.S. § 4063.

‘ 253. *Penalty for wrongful suit.* Whenever any writ or process is sued out in violation of the preceding section, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, shall be deemed a violator of the laws of nations and a disturber of the public repose, and shall be imprisoned for not more than three years, and fined at the discretion of the Court. R.S. § 4064.

254. *Exceptions as to suits against servants, etc., of minister; listing servants.* The two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States, in the service of an ambassador or a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a domestic servant of an ambassador or a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who shall upon receipt thereof post the same in some public place in his office. All persons shall have resort to the list of names so posted in the marshal’s office, and may take copies without fee. R.S. §§ 4065, 4066.

These statutory provisions were first enacted in 1790 and were copied from the British Statute of 1708 (7 Anne, ch. 12). They were merely declaratory of pre-existing principles of international law and prescribed penalties for their violation. *Trost v. Tompkins*, D.C.Mun.App., 1945, 44 A. 2d 226; *In re Baiz*, 135 U.S. 403, 10 S.Ct. 854, 34 L.Ed. 222, 227.

“ It will be noted that under the provisions of the latter part of section 254, *supra*, section 253, providing the ‘ penalty for wrongful suit ’, does not apply to domestic servants unless the name of the servant has been registered with the Department of State and transmitted by the Secretary of State to the Marshal of the District of Columbia, who posts the same. The list upon which the names of these domestic servants are placed is known as the State Department ‘ White List ’, as distinguished from the ‘ Blue List ’ which contains the names of diplomatic officers and members of their families. While the Federal Cases do not specifically hold that the immunity

for domestic servants, under section 252, is dependent upon registration on the White List under section 254, there is strong intimation that such is the case. In *Trost v. Tompkins*, D.C.Mun.App., 1945, 44 A. 2d 226, *supra*, the formation of this White List both in England and the United States is explained in detail. In discussing section 253, *supra*, it is there said, 44 A. 2d at page 229: 'The plain implication of the language used is that to secure the protection of his servants, the ambassador or minister must register them, *i.e.*, furnish their names to the State Department, and thereupon it becomes the duty of the Secretary of State to transmit the names so "registered" to the marshal'. (Emphasis supplied here.) *Carrera v. Carrera*, 1948, 84 U.S.App.D.C. 333, 174 F. 2d 496, was a suit for separate maintenance of herself and son brought by a wife against her husband, Amable H. Carrera, a domestic servant of the Czechoslovakian Embassy. The State Department advised the Court that the defendant pursuant to the provision of section 254, *supra*, was on the White List, registered with the State Department. It was said in that case, 174 F. 2d at page 497: 'The next contention of the appellant is that the inclusion of Amable's name on the so-called "White List" was not sufficient to bring him within the second clause of section 254 which would extend to him the protection of sections 252 and 253. . . . But here, the Secretary having certified Carrera's name as included in the list, judicial inquiry into the propriety of its listing was not appropriate.' See also *Wheaton's International Law* (6th ed.) p. 286; *International Law*, Chiefly as Interpreted and Applied by the United States, Second Revised Edition, Charles Chaney Hyde, Vol. II, pp. 1273, 1274. Compare *U.S. v. Jeffers*, 26 Fed. Cas. p. 596, No. 15,471.

"Section 252, *supra*, by plain words limits the immunity to suits against ministers and their domestics, to ministers 'of any foreign prince or State, authorized and received as such by the President'. There is nothing in this case to show that Colonel de Schinkel was so 'authorized and received as such by the President'. The method of presenting such proof is set out in *Compania Espanola v. The Navemar*, 303 U.S. 68, 58 S.Ct. 432, 82 L.Ed. 667. See also *Ex parte Muir*, 254 U.S. 522, 41 S.Ct. 185, 65 L.Ed. 383; *Kuniglich Jarnvagsstyrelsen v. Dexter & Carpenter, Inc.*, D.C., 300 F. 891; *The Pesaro*, 255 U.S. 216, 41 S.Ct. 308, 65 L.Ed. 592; *In re Baiz*, 1890, 135 U.S. 403, 421, 10 S.Ct. 854, 34 L.Ed. 222, *supra*. The afore-quoted paper from Colonel de Schinkel was an unauthenticated statement, allegedly signed by him without witnesses, affidavit, notarization, or seal thereto attached, and of course was not admissible in evidence. Code, Article 35, sections 52, 53.

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" Finally, as the State Department of the United States has ruled that appellant is not entitled to diplomatic immunity, that ruling is binding on this Court. As above set forth, the certificate from the State Department to this Court states: ' . . . Carl Haley does not have immunity under the sections of Federal law above quoted for the reason that there has been no official notification to the United States of any diplomatic status, hence he could not be accepted and received as such by the United States '. In *Re Baiz*, 1890, 135 U.S. 403, 10 S.Ct. 854, 862, 34 L.Ed. 222, *supra*, Jacob Baiz, a citizen of the United States, who was a resident of New York City and the consul-general of the Republic of Guatemala, was sued in libel. The Supreme Court of the United States held that even in the absence of its minister, he was not its diplomatic representative or minister during such absence, and not entitled to diplomatic immunity from suit. Chief Justice Fuller in that case pointed out that the State Department when requested for a certificate of Mr. Baiz's status had politely declined to give the certificate desired, because it could not properly be done. He said: ' We ought to add that while we have not cared to dispose of this case upon the mere absence of technical evidence we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the state department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof '.

" In *Carrera v. Carrera*, 84 U.S.App.D.C. 333, 174 F. 2d 496, 497, *supra*, it was said: ' It is enough that an ambassador has requested immunity, that the State Department has recognized that the person for whom it was requested is entitled to it, and that the Department's recognition has been communicated to the Court. " The Courts are disposed to accept as conclusive of the fact of the diplomatic status of an individual claiming an exemption, the views thereon of the political department of their Government." Hyde's *International Law*, Chiefly as Interpreted and Applied by the United States, Second Revised Edition, Vol. II, p. 1268. In *Trost v. Tompkins*, D.C.Mun.App., 44 A. 2d 226, *supra*, it is said at p. 231: ' The delicacy of the question, involving as it does the relations of our Government with a friendly foreign nation, is such that the absence of a decision by the executive department charged with responsibility for the conduct of our affairs abroad, is to be regretted. The usual rule is that " Courts have no jurisdiction to decide political questions ". *Sevilla v. Elizalde*, 72 App.D.C. 108, 112 F. 2d 29.' See also *Girardon v. Angelone*, 234 App.Div. 351, 254 N.Y.S.

657. In *United States v. Coplon*, D.C.S.D.N.Y., 84 F.Supp. 472, Judith Coplon and Valentine A. Gubitchev were indicted for violation of the espionage laws. Gubitchev was a citizen of the Union of Soviet Socialist Republics and a member of the staff of the Headquarters Planning Office of the Secretariat of the United Nations. He claimed diplomatic immunity thereby. The Court (Rifkind J.) said in that case, 84 F.Supp., at p. 475: 'The dispositive fact is that the State Department has declared to the Soviet Embassy by aide-memoire of March 24, 1949, and aide-memoire of April 29, 1949, that defendant does not enjoy diplomatic status. That is a political decision which the Courts do not review. See *In re Baiz*, 1890, 135 U.S. 403, 432, 10 S.Ct. 854, 34 L.Ed. 222; *Sullivan v. State of Sao Paolo*, 2 Cir., 1941, 122 F. 2d. 355, 357-358. *United States v. Benner*, C.C.E.D.Pa. 1830, 24 Fed. Cas. [p. 1084] No. 14,568; *United States v. Ortega*, C.C.E.D.Pa. 1825, 27 Fed. Cas. [p. 354] No. 15,971; *United States v. Liddle*, C.C.E.D.Pa. 1808, 26 Fed. Cas. [p. 936] No. 15,598.' See also *Engelke v. Musmann*, 1928 Appeal Cases 433; *In re Suarez*, 1918, 1 Chan. 176, 195, 199.

"In a later case of *U.S. v. Coplon*, 88 F. Supp. 915, 920, where Gubitchev also claimed diplomatic immunity the Court (Ryan J.) said: 'Furthermore, we have in this case the certification by the Department of State that the defendant does not enjoy diplomatic status, which, as Judge Rifkind held, is "the dispositive fact."' *U.S. v. Coplon*, D.C., 84 F.Supp. at 475, citing cases. *Diplomatic status is a political question and a matter of state; the finding of the Secretary of State must be accepted unquestioned.* The Courts of the United States are not alone in applying this rule. "Thus in Great Britain, *Engelke v. Musmann*, 1928, A.C. 434, 435, in the United States, *United States v. Liddle*, 1808, 26 Fed. Cas. [p. 936], No. 15,598; *United States v. Benner*, 1830, 24 Fed. Cas. [p. 1084], No. 14,568, Baldw. 234; *In re Baiz*, 1890, 135 U.S. 403, 10 S.Ct. 854, 34 L.Ed. 222, and apparently in France *Drtilek v. Barbier* (1925), Cour d'appel de Paris, 53 Journal de droit international privé (1926), 638, the decision of the executive department as to whether a person is a member of a foreign mission or of its personnel is conclusive upon the courts." Research in International Law, Harvard Law School, 1932, p. 76.' (Emphasis supplied.)

"It was certainly not the intention that an American citizen should be immune from prosecution by merely submitting an unauthenticated request by his employer that immunity be extended when the State Department certifies that the

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defendant is not entitled to such immunity. The judgment will be affirmed."

[Reports: 200 Md. 72; 88 A. 2d 312.]

iv.—The Official Residence of a Diplomatic Envoy

Case
No. 91

Diplomatic Immunity—Status of Foreign Legation—Marriage Celebrated in Foreign Legation—Lack of Compliance with Formalities of Local Law—Whether Children of Marriage Legitimate in Receiving Country.

MARRIAGE IN BULGARIAN LEGATION CASE.

Austria, Supreme Court.

October 25, 1952.

THE FACTS.—Austrian law requires that a marriage, in order to be valid, shall be celebrated before an Austrian Registrar of Marriages. A Bulgarian Law of August 9, 1949, provided that a Bulgarian national could validly contract a marriage before the consular or diplomatic representative of Bulgaria in the foreign country concerned. A Bulgarian national contracted a marriage with an Austrian woman at the Bulgarian Legation in Vienna. A child was subsequently born, and the parents applied to the Registrar of Births in Vienna for registration of the birth as being legitimate. The application was refused on the ground that, as the marriage had not been celebrated in accordance with Austrian law, the child was illegitimate. The Court of first instance directed that the child be registered as legitimate, while the Court of Appeal allowed the appeal of the Registrar against such registration. On appeal to the Supreme Court,

Held: that, notwithstanding that a marriage celebrated in a foreign legation is a marriage celebrated in Austria, its validity must be determined in accordance with the law of the husband's nationality; as, according to Bulgarian law, the marriage was valid, the issue of the marriage must be held to be legitimate. The Court said:

"The Court of Appeal has rightly held that the concept of extritoriality is—generally speaking—limited to the personal immunity of the ambassador and the personnel of the embassy, and that a marriage celebrated in the legation building of a foreign State is a marriage which has, in fact, been celebrated in Austria, and not in a foreign country. Accordingly, diplomatic or consular marriages are not, as a rule, accorded recognition in Austria. . . . That, however, does not conclude the question of the legitimacy of the child. . . . According to the

recognized rule of private international law in this behalf, the question of legitimacy has to be determined in accordance with Bulgarian law. Article 30 of the Bulgarian Law of August 9, 1949, provides that the marriage of a Bulgarian national in a foreign country may be contracted before the consular or diplomatic representative. This marriage therefore was validly celebrated in accordance with the formalities required by Bulgarian law, with the result that the child, notwithstanding the invalidity of the marriage in the territory of the Republic of Austria, is legitimate in accordance with Bulgarian law and was rightly registered as legitimate in the Registrar of Births."

[Report: SZ, XXV (1952), p. 730.]

D—CONSULS

II.—Position and Functions of Consuls

Consuls—Functions of—Right to Represent Nationals—	Case
Consuls as Attorneys-in-Fact—Treaties—Interpretation of—	No. 92
Liberal Interpretation.	

In re ARBULICH'S ESTATE.

*United States, District Court of Appeal, First District,
California.*

September 24, 1952.

THE FACTS.—The decedent, an American citizen, by will disinherited one brother, an American citizen, and left his estate to a second, a citizen and resident of Yugoslavia. The former contended that the latter was ineligible to take under the will for the reason that (it was claimed) Yugoslavia did not grant reciprocal rights of inheritance to American citizens inheriting from citizens of Yugoslavia, the California statute then providing that non-resident aliens could inherit pursuant to California law only if the country of which they were citizens granted reciprocity. The Yugoslav claimant introduced in evidence the text of a Treaty of 1881 between Serbia and the United States providing that citizens of Serbia and the United States shall enjoy most-favoured-nation rights with respect to the acquisition and disposition of property by testament, inheritance, and other means, and further introduced evidence purporting to demonstrate that reciprocity was in fact the rule between Yugoslavia and the United States. Evidence of a contrary character was introduced by the American claimant. The trial Court found in favour of the American claimant on the question of the existence of reciprocity, and further held that

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the Yugoslav claimant was not properly represented in that his lawyer possessed no direct authority from the Yugoslav claimant, but had merely been appointed by the Consul-General of Yugoslavia. From these holdings, the Yugoslav claimant appealed.

Held: that the decision must be reversed. The Court said, in part:

"The fact that the Court disapproved of the form of the Government of Yugoslavia was not relevant at all on the issue of reciprocity. Yugoslavia is a sovereign state and is recognized as such by the Government of the United States. As long as some right of inheritance is recognized in that State, and the evidence here without conflict discloses that it is, the fact that such right differs from the right of inheritance in this country, or that as an individual a Judge may disapprove of the form of Government, are factors which are not relevant and should not be considered on the issue of reciprocity. This was clearly pointed out in the *Estate of Kennedy*, 106 Cal. App. 2d 621, 235 P. 2d 837, involving Romania, a country that is not only communistic, but within the sphere of influence of Russia, which Yugoslavia certainly is not. Some degree of socialization and nationalization has taken place in most European countries, a policy we as individuals may or may not approve, but as Judges passing on the issue of reciprocity, the form of such Governments is a false factor, and a matter for each sovereign country to determine for itself.

"The fact that an American claimant of an estate in Yugoslavia would be subject to foreign exchange controls and could not immediately receive his legacy in this country is also an irrelevant factor. Practically every country in the world has some limitation on the export of wealth from the country. Such factor has nothing to do with the issue of reciprocity. It was so held in *Re Estate of Miller*, 104 Cal. App. 2d 1, 230 P. 2d 667, and *In re Estate of Blak*, 65 Cal. App. 2d 232, 150 P. 2d 567.

"Much is said in the briefs about the proper interpretation of the treaty of 1881 and about how such treaty should be interpreted in view of the case of *Clark v. Allen*, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633. The question is not how that treaty should be interpreted as a matter of law, but how the contracting parties have interpreted it. The Ambassador testified that it had been interpreted to grant reciprocity to all American nationals. While there is no evidence directly contrary to this, there may be inferences that would support a finding to the contrary. Any gaps in the evidence on this point can be supplied on the new trial. . . .

"The contention that appellant was not properly represented is based upon the fact that the lawyer appearing on

behalf of appellant was appointed by the Consul-General of Yugoslavia to represent appellant. The lawyer had no power of attorney from appellant nor any other direct authority to represent him. Throughout the trial, counsel for respondent objected on this ground, and the trial Judge, on many occasions, observed that he thought a personal power of attorney was indispensable. As already pointed out, an express finding was made on this issue.

" The petition of John Arbulich, Jr. alleges that it is filed by the Consul-General of Yugoslavia as attorney in fact for John. It is further averred that under the power and authority vested in the Consul-General by the United States and by the laws and treaties between the United States and Yugoslavia, he, as Consul-General, has the power and authority to act as attorney in fact for his nationals who inherit American property. The recognition by the United States of the Consul-General with power ' to exercise and enjoy such functions, powers and privileges as are allowed to the Consuls-General of the most-favoured-nations in the United States ' was duly proved. The question is, can the Consul-General appear in our Courts as attorney in fact for his nationals in a probate proceeding? Can a Consul appoint counsel to represent such nationals? The answer is clear that he may.

" The parties discuss the proper interpretation of an article in the Consular Convention between the United States and Serbia concluded in 1881, 22 Stat. 968 contemporaneous with the other Serbian treaty already mentioned in this opinion, and, like it, recognized by both the United States and Yugoslavia as being still binding. Article XI provides:

' In the case of the death of any citizen of the United States in Serbia, or of a Serbian subject in the United States, without having any known heirs or testamentary executors by him appointed, the competent local authorities shall give information of the circumstance to the consuls or consular agents of the nation to which the deceased belongs, in order that the necessary information may be immediately forwarded to the parties interested.

' Consuls-general, consuls, vice-consuls and consular agents shall have the right to appear, personally or by delegate, in all proceedings on behalf of the absent or minor heirs or creditors until they are duly represented.'

" The parties argue over the proper interpretation of this treaty. Appellant argues that the second paragraph should be read independently of the first so as to give the Consul-General the power alleged to exist. Respondent argues that the first paragraph limits the operation of the second paragraph to nationals dying abroad in the other country, and does not

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include the right to represent in the other country nationals residing at home. If the document alone be considered, either interpretation is reasonable. But the treaty provision must be considered together with applicable principles of international law. Without reference to any treaty provision, it is a well settled principle of international law that consular representatives are deemed to be international attorneys in fact for their nationals. One of the earliest cases so holding, and a leading case on the subject, is *The Bello Corrunes*, 6 Wheat. 152, 5 L.Ed. 229. In that case the United States Supreme Court held that a vice-consul of Spain was entitled to make a claim by way of libel on behalf of Spanish owners of a Spanish ship resident in Spain and whose identities were unknown to the consul. In that case the following frequently quoted statement appears, 6 Wheat. at p. 168, 5 L.Ed. 229: 'On the first point made by the Attorney-General, this Court feels no difficulty in deciding, that a vice-consul, duly recognized by our Government, is a competent party to assert or defend the rights of property of the individuals of his nation, in any Court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in Courts only, it would be a mockery, to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the Courts of the United States, has sanctioned the exercise of this right, and it is impossible, that any evil or inconvenience can flow from it. Whether the powers of the vice-consul shall, in any instance, extend to the right to receive, in his national character, the proceeds of property libelled and transferred into the registry of a Court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized. Much, in this respect, must ever depend upon the laws of the country from which, and to which, he is deputed. And this view of the subject will be found to reconcile the difficulties supposed to have been presented by the authorities quoted on this point.'

"In the case of *In re Tartaglio's Estate*, 12 Misc. 245, 33 N.Y.S. 1121, it was held, both as a result of an interpretation of a treaty with Italy and by general international law, that the Italian Consul-General could properly apply and receipt for the distributive shares of personal property on behalf of the Italian heirs.

"In the case of *Buxhoeveden v. Estonian State Bank*, 181

Misc. 155, 41 N.Y.S. 2d 752, there is a good collection of case and text authorities. There, both by treaty and on general principles, the Estonian Consul-General was permitted to appear and set aside a default judgment, and to defend a suit against the Estonian State Bank, treated in the opinion as a private person.

"The case of *In re Zalewski's Estate*, 292 N.Y. 332, 55 N.E. 2d 184, 157 A.L.R. 87, is another good case on the subject, and collects and comments on many relevant authorities. There it was held by the New York Court of Appeals that either by treaty or by general principles of international law, a consular representative could even exercise on behalf of one of its nationals resident in the home country the personal right of a widow to elect not to take under a will. While three justices dissented in that case, they did so only on the ground that the power of the consul did not extend to the exercise of such a personal right—they did not disagree with the majority holding that a consul has the right to appear and to represent his nationals.

"In interpreting the treaty provision here involved, the following principles stated in *In re Zalewski's Estate*, 292 N.Y. 332, 55 N.E. 2d 184, 186, 157 A.L.R. 87, amply supported by authority, are applicable: 'In arriving at the meaning of the treaty we are bound to remember that it is the supreme law of the land . . . , that its words are to be taken liberally in the light of evident purposes . . . and that, since the pact is done in counterparts, one in each language little use can be made of local technical definitions of words. . . . When two constructions of a treaty are admissible, one restrictive of the rights that may be claimed under it and the other liberal, the latter is always to be preferred. . . . 'This court would not readily lean to favor a restricted construction of language, as applied to the provisions of a treaty, which always combines the characteristics of a contract, as well as a law.' *The Bello Corrunes*, 6 Wheat. 152, 171, 5 L.Ed. 229.'

"With these well settled principles in mind we have no reasonable doubt but that the treaty here involved should be interpreted so as to confer a treaty right on the consuls of the contracting countries to appear on behalf of their nationals not otherwise represented and to represent them in the Courts of the other country. . . . "

[Reports: 248 P. 2d 179; *certiorari* denied, 346 U.S. 897; 74 S.Ct. 219; 98 L.Ed. 398; 347 U.S. 908; 74 S.Ct. 426; 98 L.Ed. 1066 (1953).]

NOTE.—This case is summarized in *American Journal of International Law*, 47 (1953), p. 323. For a finding of reciprocity on the part of Roumania, see *In re Kennedy's Estate* (1951), 235 P. 2d 837.

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The Court in *In re Peter's Estate* (1952), 110 Cal. App. Rep. 2d 723, 244 P. 2d 88, found a lack, in 1944, of reciprocity with Germany, on the grounds that (a) the German law then in force provided that denationalized Germans could not inherit from German nationals, and such denationalized persons might become United States citizens, and (b) such law also provided that the estates of German Jews escheated to the Reich, and, accordingly, American heirs of German Jews would take nothing.

**Case
No. 93**

Consuls—Functions of—Receipt of Distributive Shares of an Estate—Recognition of Governments—Judicial Notice of Actual Control of Territory by an Unrecognized Government.

In re YEE YOKE BAN'S ESTATE.

United States, Surrogate's Court, New York County.

July 3, 1951.

THE FACTS.—The Consul-General of the Republic of China requested delivery to him of certain distributive shares of persons resident in China. The Public Administrator, in opposition, relied on a statute empowering the Court to withhold payment where the distributees "would not have the benefit or use or control of the money . . . or where other special circumstances make it appear desirable. . . ."

Held: that the shares of such non-resident aliens should not be paid over to the Consul-General. The Court said:

"It has been held that if the foreign legatees or distributees would not have the benefit of the gifts to them, the Court would direct payment into the City Treasury pursuant to section 269, *Matter of Bold's Estate*, 173 Misc. 545, 18 N.Y.S. 2d 291; *Matter of Landau's Estate*, 172 Misc. 651, 16 N.Y.S. 2d 3, modified 187 Misc. 925, 66 N.Y.S. 2d 16. Moreover, proof that the distributees will not have the benefit of the property is sufficient to warrant the Court in withholding payment to the non-resident distributees despite the existence of a treaty authorizing payment to the foreign consul, *Matter of Weidberg's Estate*, 172 Misc. 524, 15 N.Y.S. 2d 252; *Matter of Plemich's Estate*, 176 Misc. 560, 28 N.Y.S. 2d 86. In both *Matter of Blasi's Estate*, 172 Misc. 587, 15 N.Y.S. 2d 682 and *In re Alexandroff's Estate*, Sur., 61 N.Y.S. 2d 866, modifying 183 Misc. 95, 47 N.Y.S. 2d 334; *Id.*, Sur., 46 M.Y.S. 2d 928, where the Court directed payment to the foreign consul, it was found that the legatees would, in fact, have the benefit, use and control of the property.

"With respect to checks and warrants drawn against funds of the United States in favor of nationals of the Russian 'bloc' nations, the Treasury Department has ruled that since 'there is not a reasonable assurance that a payee in those areas will actually receive' payment, delivery will be withheld, 16 Fed.

Reg. 1818, February 27, 1951, amending 31 Code Fed. Reg. § 211; *In re Estate of Thomae*, Sur., 105 N.Y.S. 2d 844; *In re Estate of Geffen*, 199 Misc. 756, 104 N.Y.S. 2d 490, despite the existence of treaties between the United States and some of these countries.

"In this case, the Consul-General relies upon the most-favored-nation clause of the Treaty between the Republic of China and the United States which makes applicable any pertinent provision in other United States treaties. The provision thus invoked reads as follows: 'A consular officer of either High Contracting Party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in process of probate . . . provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission'. See *Matter of Blasi's Estate*, *supra*, 172 Misc. at p. 589, 15 N.Y.S. 2d at p. 684. No evidence has been presented to the Court concerning the possibility of transmitting the funds to China, and by Executive Order unlicensed payments to nationals of China and North Korea have been prohibited. Executive Order No. 9193, 50 U.S. C.A. Appendix, § 6 note.

"The Court will take judicial notice of the fact that the mainland of China is controlled by the Communist Government, which has not been recognized by the United States Government, and that the sovereignty of the Republic of China extends only to the island of Formosa. Hence, it will be impossible for the consul to transmit these funds to the proper distributees. In these circumstances, the shares of the non-resident aliens will be paid into the City Treasury."

[Reports: 107 N.Y.S. 2d 221; 200 Misc. 499.]

NOTE.—In *Matter of Best* (1951), 200 Misc. 333, a like decision was reached respecting distributees who were Soviet nationals, pursuant to a United States Treasury regulation promulgated on February 27, 1951, declaring that, as to nationals of the U.S.S.R., "there is not a reasonable assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States" (16 Federal Register 1818). *In re Estate of Braier* (1951), 108 N.Y.S. 2d 417, applies this ruling as regards Hungary. For similar cases, see also *In re Geffen* (1951), 104 N.Y.S. 2d, 196 Misc. 756; *Estate of Getream* (1951), 107 N.Y.S. 2d 275, 200 Misc. 534; *Matter of Hildebrand*: New York Law Journal, July 2, 1952, p. 16; *Matter of Hirschberg* (1952): 112 N.Y.S. 919; *In re Estate of Hoen* (1951): 107 N.Y.S. 2d 407; *In re Shapiro* (1952): 112 N.Y.S. 2d 46; *Matter of Thomae* (1951): 199 Misc. 940; and *Matter of Wong* (1951): 199 Misc. 1119; as well as *In re Niggol's Estate* (1952):

Case No. 93 115 N.Y.S. 2d 557, 202 Misc. 290 (see Case No. 18 in this volume, and the cases there noted).
Contd.

Consuls—Functions of—Consul-General Performing Diplomatic Functions—Whether Entitled to Diplomatic Privileges and Immunities.

See Case No. 94 (*Juan Ysmael & Co. v. S.S. Tasikmalaja*).

III.—Privileges and Immunities of Consuls

Case No. 94 Consuls—Immunities of—Consul-General Performing Occasional Diplomatic Functions—Claim to Diplomatic Immunity—Subjection to Civil Jurisdiction—Liability to Cross-Examination on Affidavit Evidence—Diplomatic Immunity—Minor Officials—Status of Diplomatic Courier—The Law of Hong Kong.

JUAN YSMAEL & CO. *v.* S.S. TASIKMALAJA.

Hong Kong, Supreme Court (Admiralty Jurisdiction).

(Reece J.)

August 27 and September 15, 1952.

THE FACTS.—The circumstances giving rise to this case formed the subject of an Admiralty action in the Supreme Court of Hong Kong, in which Yuan (or Juan) Ysmael and Company, Incorporated, claimed the immediate possession of the vessel *Tasikmalaja* (*ex* the S.S. *Cristobal* and the S.S. *Haleakala*) from persons in possession of the ship who claimed to hold it on behalf of the Government of Indonesia. A second Admiralty action was brought against the *Tasikmalaja* by Anthony Loh, trading as A. W. King. In both these actions the Indonesian Government filed a motion seeking to set aside the writs in Admiralty on the ground that they impleaded a foreign sovereign State. The main issues concerning the immunity of a sovereign Government in the courts of law of a foreign State were carried to appeal, first to the Court of Appeal in Hong Kong and finally to the Judicial Committee of the Privy Council.¹ However, in the course of the action in first instance, the rights and privileges in relation to the local jurisdiction of the Consul-General of Indonesia in Hong Kong and of a diplomatic courier of Indonesia were raised, and these issues having been decided by the Court of First Instance (following the intervention of the Attorney-General for

¹ See [1955] A.C. 72 (to be reported in *International Law Reports*, 1955).

Hong Kong), they were not appealed against. They form the subject of this separate report.

The facts giving rise to the proceedings in the Supreme Court and the subsequent orders and judgments of that Court were as follows. On June 27, 1952, the plaintiffs in the original action (the respondents in the subsequent appeals), issued a writ in Admiralty in the Supreme Court of Hong Kong, claiming possession of the vessel *Tasikmalaja*, which was then in the harbour of Hong Kong and in the possession—as it transpired—of agents of the Government of Indonesia. On the same day the plaintiffs filed a *praecipe* for a warrant for the arrest of the vessel, whereupon the Head Bailiff, acting under the directions of the Court, arrested the ship, but permitted it to remain, while in the custody of the Court, in the *de facto* control of the master, who, thereafter, held it on behalf of the plaintiffs until he was obliged to go ashore on July 5. On June 30, the Consul-General of Indonesia (Mr. Kwee Djee [or Djie] Hoo), acting on the instructions of his Government, purported, by a letter, to dismiss the master. Subsequently, certain members of the crew intimidated the master and obliged him, as he alleged, to leave his ship on July 5. In consequence of this action the plaintiffs obtained a motion for the arrest of the members of the crew concerned, on the ground that their action constituted a contempt of court in that it interfered with the custody of the Bailiff. This motion was heard on July 11, and judgment upon the motion was delivered on July 18, when an order was made restraining the crew from further acts of interference with the custody of the Bailiff.

On July 7, the Government of the Republic of Indonesia entered a conditional appearance to the plaintiffs' writ of June 27, and on July 19 applied by motion to have the writ set aside on the grounds that (1) the action impleaded a sovereign State, namely, the Republic of Indonesia, which was unwilling to submit to the jurisdiction of the Court, (2) that the steamship *Tasikmalaja*, the subject of the action, was the property of the Government of Indonesia, (3) that further, or alternatively, the vessel was at all material times in the possession of the Government of Indonesia by its duly authorized agents, and (4) that the Government of Indonesia was at all material times entitled to possession of the vessel. This motion was supported by the affidavit evidence of the Consul-General and of a diplomatic courier (Major Pamoerhardjo). The plaintiffs then applied for an order directing the Consul-General and the courier to attend before the Court to be cross-examined upon their affidavits. At the hearing of the motion the Consul-General and the courier sought the discretion of the Court to refuse leave to order their cross-examination.

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On August 25, however, the Court made an order for cross-examination on the ground that these officers were not entitled to the immunities customarily accorded to diplomatic agents. On August 27, the Court held that by international law these officials were not entitled to diplomatic immunity. At a resumed hearing of the case, in which the Attorney-General of Hong Kong intervened on behalf of Her Majesty's Government, the Court (on September 15) found itself unable to alter its decision.

Held (on August 27, 1952): that neither the Consul-General nor the diplomatic courier were entitled to immunity from the jurisdiction of the Court, and that since neither was entitled to immunity neither could waive his immunity in any manner. Reece J. said:

" . . . The substance of Mr. Kwee's claim as set out in his affidavit is that he is the only direct channel of communication between his Government and the Government of Hong Kong and that he has on many occasions communicated on matters of a diplomatic nature with the Government of Hong Kong on behalf of his Government, the Government of Indonesia. And he claimed that he had to perform duties usually performed by diplomatic officers, one such duty being the claim for immunity on behalf of the Government of Indonesia in the action now before the Court.

" It seems convenient to mention here that Mr. McNeill directed the Court's attention to two Gazette Notices published in the Hong Kong Government Gazette of August 18, 1950, and October 6, 1950, respectively, the former of which reads as follows:—'H.E. the Officer Administering the Government, under instructions from the Secretary of State for the Colonies, has been pleased to recognize Mr. Kwee Djee Hoo, provisionally and pending the issue of His Majesty's Exequatur, as Consul-General for Indonesia at Hong Kong.'

" The latter notice, No. 1156, of October 6, 1950, reads thus: 'It is hereby notified that the King's Exequatur empowering Mr. Kwee Djee Hoo to act as Consul-General for Indonesia at Hong Kong has received His Majesty's signature.'

" These two notices show clearly that Mr. Kwee Djee Hoo had been appointed to act as Consul-General for Indonesia in Hong Kong and that His late Majesty had granted recognition to him in that capacity.

" It is contended for Mr. Kwee Djee Hoo that he is entitled to diplomatic privileges. First I will consider the law regarding the status of consuls generally and then examine the cases which have been cited to support the contention that Mr. Kwee Djee Hoo is entitled to diplomatic privileges. It is of

interest to note that Counsel engaged have cited the same cases in presenting the arguments for and against the claim to immunity on behalf of Mr. Kwee.

"In the 6th Volume of Halsbury's Laws of England, 2nd ed., paragraph 642, it is stated:

'A consular officer is not a public minister, and is not, therefore, *eo nomine*, entitled to the privileges accorded to persons of diplomatic character. Where diplomatic and consular officers are united in the same persons, as in the case of a consul-general appointed to act as attaché to a legation, the diplomatic character will be recognized.'

"In Volume 1 of Oppenheim's International Law, 6th ed., at p. 752, section 434, in discussing the position and privileges of consuls the author writes:

'Consuls do not enjoy the position of diplomatic envoys, since no state in practice grants to foreign consuls the privileges of diplomatic agents.'

"After stating that it would be incorrect to maintain that their position is in no way different from that of any other person living in the Consular district since they are appointed by foreign States, and, on receipt of the *exequatur*, are publicly recognized by the admitting States as agents of the appointing State, the author continues:

'Of course, consuls are not diplomatic representatives, for they do not represent the appointing States in the totality of their international relations, but for a limited number of tasks, and for local purposes only. Yet they bear a recognized public character, in contradistinction to mere private individuals, and consequently, their position is different even though legally they may not be entitled to claim special privileges of any kind.'

"Both Mr. McNeill and Mr. Bernacchi have referred to section 435 of Oppenheim at p. 753, each counsel reading what seemed fit for the purpose of his argument, but I will set out the article incorporating both passages cited. It is:

'From the undoubted official position of consuls no universally recognized privileges of importance have as yet been evolved. Apart from the special protection due to consuls according to International Law, there is neither a custom nor a universal agreement between the Powers to grant them ordinary diplomatic privileges. Such privileges of a diplomatic character as consuls actually enjoy are granted to them either by courtesy or in compliance with special stipulations in a commercial or consular treaty between the sending and the admitting State. However, consuls do in fact enjoy the jurisdictional immunities granted to diplomatic representatives inasmuch as, according to the generally accepted practice, they are not liable in civil and, perhaps, in criminal proceedings in respect of acts which they perform in their official capacity on behalf of their States and

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which fall within the scope of consular functions as recognized by International Law.'

" It seems to me to be crystal clear from the passages cited both from Halsbury and Oppenheim that while consuls are recognized as being different from private individuals, they do not enjoy as such any diplomatic privileges and that if any diplomatic privileges are accorded them, they are so accorded as an act of courtesy or at most by virtue of some special arrangement between the States concerned. That appears to me to be the position of a consul in the eyes of the law as well today as in earlier times. For in *Barbuit's Case* (1737) Cases T. Talbot 281 (25 English Reports, 778) the Lord Chancellor said: ' It is the opinion of Barbeyrac, Wincquefort and others, that a consul is not entitled to the *ius gentium* belonging to Ambassadors '. By the *ius gentium* or law of nations is meant the privilege belonging to ambassadors or ministers who are accredited to a State.

" Now Mr. McNeill contended that Mr. Kwee has to perform functions of a diplomatic nature on behalf of his Government and that while those duties may be small and rare they carry diplomatic immunity. In support of this contention he cited passages from the judgment of Wills J. in *Parkinson v. Potter* (1885), 16 Q.B.D. 152 at p. 159 and from the judgment of Lord Phillimore in *Engelke v. Mussman*, [1928] A.C. 433 at p. 449.¹ In *Parkinson v. Potter*, at p. 159, Wills J. said: ' But I can very well understand that, seeing the close connection between diplomatic business and some of the matters which it falls to a consul-general to transact, there may be a convenience in clothing the consul-general with the additional character of an attaché, which may explain and justify his appointment in that capacity, although his services in a diplomatic character may be only slight and occasional. An attaché is a well-known term in the diplomatic service. He forms part of the regular suite of an ambassador.'

" It seems unnecessary to go into the facts in any detail. It will be sufficient to say that a lessor leased a dwelling-house to a lessee who had covenanted to pay the sewer rates and all other rates and taxes. The lessee of the said dwelling-house assigned it to an attaché of a foreign embassy who occupied it as his residence. The assignee claimed to be exempt from liability to pay parochial rate and the parish authorities enforced payment against the lessor. In an action by the lessor against the lessee to recover the amount paid by him, the Court held that payment of the rate was not enforceable against an attaché of a foreign embassy and it was in the course of his

¹ See *Annual Digest*, 1927-1928, Case No. 245.

judgment that Wills J. stated the words quoted above. Matthew J. in his judgment at p. 157 said: ' . . . We can only say that on the evidence unanswered it appears to us that the County Court Judge was warranted in finding that De Basto was an attaché of the Embassy.' After referring to a submission that De Basto was not entitled to privilege he continued: ' But it appears from the authorities that the privilege of the embassy is recognized by the common law of England as forming a part of international law, and according to that law it is clear that all persons associated in the performance of the duties of the embassy are privileged, and that an attaché is within that privilege.'

" It seems to me to be beyond doubt that the *ratio decidendi* was the fact that De Basto was an attaché, and not that he was a consul-general performing slight and occasional diplomatic services. Indeed, the passage quoted from Mr. Justice Wills' judgment, and relied on by Mr. McNeill seems to indicate in no uncertain way that because the consul-general had to perform duties of a diplomatic nature he was appointed an attaché, and it was in that capacity of an attaché that he was entitled to diplomatic privilege, being a member of the diplomatic service.

" The later case of *Engelke v. Musmann* cited above does not, in my opinion, do more than repeat the same principle as enunciated in *Parkinson v. Potter*. At p. 449 Lord Phillimore virtually repeats the passage quoted above from *Parkinson v. Potter*. He says: ' For reasons which will appear in the course of this opinion, it is not necessary to go very deeply into this point, but I may observe that the positions of diplomat and consular employee are not mutually exclusive, and that indeed it has been in the past not uncommon to clothe a consul or consul-general with certain diplomatic functions and thereby to give him a diplomatic status.' The learned Lord is here emphasizing the fact that in the past it was found not uncommon to give the consul or consul-general diplomatic status. That was precisely what had been done in *Parkinson v. Potter*. Had the Court not been satisfied that Engelke was an accredited member of the ambassador's staff, he would not have been entitled to diplomatic privilege. At p. 447 Viscount Dunedin states: ' The respondent tried to convince us that, if this case was decided in favour of the appellant it was opening the door to the granting of diplomatic privilege to the Consular Service. It is nothing of the sort. Mr. Engelke will enjoy diplomatic privilege not because he is styled Consular Secretary but because he, as an accredited member of the Ambassador's household, has privilege as such and does not forfeit it because he does some consular work.'

" It seems clear to me that the decision in *Engelke v.*

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Musmann reiterates the principle laid down in *Parkinson v. Potter* and the earlier authorities that diplomatic privilege is not enjoyed by consular officers as they are not diplomatic representatives. And the observation of Lord Phillimore in my opinion means no more nor less than that consular officers do not as such enjoy diplomatic privileges, but that if a consular employee is given a diplomatic status by being clothed with diplomatic functions then he secures the privileges accorded to members of the diplomatic service. It is not the performance of some diplomatic functions that is of importance in this matter; it is being a member of the diplomatic service that seems to me the determining factor.

"Now, Mr. Kwee in his affidavit has stated that he has on many occasions communicated with the Hong Kong Government on matters of a diplomatic nature, and claims that the position of a consul-general is quite different for geographical reasons from a similar appointment within a country which has a diplomatic mission of the State to which the Consul-General belongs. That may be so, and indeed it is not unknown that small States at times send consuls who combine consular functions with those of a diplomatic envoy, instead of accrediting diplomatic envoys to another State, but consuls do not thereby become diplomatic envoys as we have already seen. Mr. Kwee does not claim that his appointment is anything more than that of Consul-General and, indeed, the Gazette notices mentioned earlier state that recognition has been given to him as Consul-General. There is no suggestion and can be no suggestion that his appointment is anything but that of an officer of the consular Service. And as such I am satisfied on the authorities to which I have referred that by international law he is not entitled to diplomatic privileges.

"Mr. McNeill further submitted that under the provisions of the *Consular Privileges Ordinance*, the *Diplomatic Privileges Ordinance*, and the *Representation of Foreign Powers (Control) Ordinance*, Mr. Kwee was entitled to diplomatic privilege. As I understand the argument presented to the Court, it is that Mr. Kwee is the person accredited to the Hong Kong Government and it is clear from the Ordinances mentioned above that the gentlemen so accredited to the Government of Hong Kong do have diplomatic functions to perform and are therefore entitled to diplomatic privileges.

"With respect to the *Consular Privileges Ordinance*, I can see nothing in the Ordinance which would suggest or could be interpreted as giving a consul any diplomatic privilege. All the Ordinance does, in my opinion, is to empower the Governor to remit certain taxes, duties and fees payable or paid by consular officials by reason of the treatment accorded

to Her Majesty's consular staff by the State representative which employs such consul or consular official.

"This remission of taxes is one of the privileges usually accorded to consular officers and in this connection I would refer again to a passage which I have already read from Oppenheim. I refer to the passage at p. 753 which reads:

"I desire to emphasize particularly the passage—'Such privileges of a diplomatic character as consuls actually enjoy are granted to them either by courtesy or in compliance with special stipulations in a commercial or consular treaty between the sending and the admitting State.'

"At pp. 754 to 755 the author sets out a list of what he describes as some of the more important stipulations to be found in treaties between States in regard to consular privileges. I quote from p. 755, paragraph (5): 'Professional consuls are often exempt from all kinds of rates and taxes, from the liability to have soldiers quartered in their houses and from the duty of appearing in person as witnesses before the Courts. In the latter case, consuls have either to send in their evidence in writing, or their evidence may be taken by a commission on the premises of the Consulate.'

"I presume that there are no consular treaties in respect of consuls in Hong Kong, certainly none in respect of the Consul for Indonesia, and it seems to me that section 3 of the *Consular Privileges Ordinance* prescribes one of the privileges of a diplomatic character which by courtesy of Governments are accorded to consuls. In other words, the Ordinance is merely declaratory of the privileges usually granted to consuls by the courtesy of nations. It is of interest to notice that the Ordinance does not grant any exemption from the duty of appearing as witnesses before the Courts.

"Before leaving this question of consular privileges, I would like to refer to that part of the passage which I have read from Oppenheim relating to immunity from civil and criminal liability in respect of acts performed in their official capacity, on behalf of their States and which fall within the scope of consular functions as recognized by International Law. The basis of this immunity is not the same as that of diplomatic representatives, for consuls do not enjoy immunity in respect of acts of a private law nature.

"With respect to the *Diplomatic Privileges Ordinance* to which Mr. McNeill directed attention, particularly to section 6 thereof, I confess myself unable to understand in what way it relates to consular officers and granting to them of diplomatic privileges. And so too with the *Representation of Foreign Powers (Control) Ordinance*. The Ordinance provides that no person shall function on behalf of any foreign power

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without the consent of the Governor and the proviso excludes from the application of the Ordinance the accredited representative of any foreign State. In so far as this applies to a consular officer, it seems to me that it confers no privilege other than that which he already enjoys. It would seem pointless to require a consular officer who has received recognition, by having the King's signed exequatur, to apply for a consent from the Governor to act for his State.

"For the reasons which I have given, I am satisfied that Mr. Kwee Djee Hoo, as Consul-General for the Government of Indonesia, is not entitled to enjoy the diplomatic privilege which he has claimed, because, as he alleges, he has to perform duties which are usually performed by diplomatic officers. Mr. Kwee Djee Hoo's position is not in that respect unique; but I am satisfied from the authorities to which I have referred that by performing the diplomatic functions, Mr. Kwee Djee Hoo, the recognized Consul-General of Indonesia, does not become thereby a diplomatic representative. I therefore order Mr. Kwee Djee Hoo to attend for cross-examination.

"I now come to deal with the case of Mr. Pamoerhardjo. He claims immunity from the process of the Court on the ground that he is a diplomatic courier, holding a diplomatic passport, and that he must, as such diplomatic courier, hold himself in readiness to carry official communications for his Government at a moment's notice. A courier is in an altogether different position from that of a consul. He has no official recognition and is granted exemption from civil and criminal jurisdiction and afforded special protection only during the exercise of his office. I can see no reason why Mr. Pamoerhardjo should be exempted from attending to be cross-examined and I cannot anticipate any situation arising as a result of his attending the Court to be cross-examined which could possibly conflict with his duty as a courier. His application is refused and he is ordered to attend the Court for cross-examination."

This concluded the hearing of August 27, 1952: (1952) 35 H.K.L.R. p. 242.

The motion of the Indonesian Government seeking to have the writ in Admiralty set aside was heard in the Supreme Court on September 15, 1952, when it was *held* that there was "no evidence to support the claim made in notice of motion filed on behalf of the Government of Indonesia" and, therefore, that the motion must be dismissed with costs.

On appeal to the Court of Appeal in Hong Kong this decision was reversed, but subsequently it was restored by the Judicial Committee of the Privy Council: see 36 H.K.L.R. 316. As a result of the intervention of Her Majesty's Government, the question of the immunity of the Consul-General of Indonesia

was again considered by the Supreme Court on September 15, when it was again *held* that he was not entitled to immunity. Reece J. said: "When the hearing was resumed on Monday, September 8, Mr. McNeill informed the Court that he was instructed to say that yesterday, September 7, a communiqué was received by Mr. Kwee Djie Hoo from his Government advising him that a communiqué had been received by his Government from Her Majesty's Government indicating that the diplomatic immunity of Mr. Kwee Djie Hoo was recognized and that a copy of the communiqué had been despatched to the Government of Hong Kong. Mr. McNeill further stated that his instructing solicitor had informed him that he (the instructing solicitor) had made inquiries of the Colonial Secretary who confirmed the receipt of the communiqué. . . . Mr. McNeill said that he had been instructed that the Government of Indonesia had instructed Mr. Kwee to waive that immunity of the Court's order to the extent that the Court should vary its original order and direct that Mr. Kwee Djie Hoo be cross-examined in the precincts of the Consulate. Mr. McNeill then asked the Court to address the Hong Kong Government to ascertain the position indicated to the Hong Kong Government by Her Majesty through the Foreign Office. Mr. McNeill stated that he could not assist the Court with regard to what the communiqué said about Major Pamoerhardjo. . . . After the application by Mr. McNeill to the Full Court on behalf of the Government of Indonesia to stay the order for cross-examination I became aware, not without concern, of the representations which had been made to Her Majesty's Foreign Office. I say not without concern because it seemed to me that any such representations could only have been made for one purpose, and for one purpose only, and that purpose was to undermine the authority not only of the Supreme Court, but also of the Full Court of Hong Kong. For when the application was made . . . whether it was made on the advice of Counsel on behalf of the Government of Indonesia or not, and irrespective of whether it was made without the knowledge of such Counsel, the fact remains that there was a valid and subsisting order of the Supreme Court requiring that the Consul-General . . . and the courier . . . present themselves for cross-examination on the affidavits they had filed in the actions before the Court and that there was then pending before the Full Court of Hong Kong an appeal against this order. There was also subsisting a valid order of the Supreme Court that neither Mr. Kwee nor Major Pamoerhardjo was entitled to diplomatic immunity. . . . In these circumstances, I requested His Lordship the Chief Justice to address His Excellency the Governor to ascertain the true facts. In due course, I received a reply to the effect that the Hong

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Kong Government had not directly received any instruction or opinion upon the status of the Consul-General for Indonesia and that the Honourable and Acting Attorney-General would attend Court next day to state the position of this Government.

"On Tuesday, September 9, the Honourable Acting Attorney-General attended Court and read a statement which I deem it advisable to reproduce here. The statement is as follows:

'The Hong Kong Government has received a copy of a telegram from the Foreign Office to Her Majesty's Ambassador in Djakarta instructing Her Majesty's Ambassador to explain to the Indonesian Government the attitude of Her Majesty's Government to the position taken up by Mr. Kwee and Major Pamoerhardjo in the proceedings before your Lordship. The Hong Kong Government has no reason to believe that Her Majesty's Ambassador has not acted upon his instructions. Be that as it may, your Lordship will appreciate that the Hong Kong Government is not in a position to communicate to the Court the contents of a communication not addressed to such Government and which it has not been authorized to disclose. I regret that I am unable to elaborate what I have said except to state positively that the Hong Kong Government has not received a copy of any communiqué from Her Majesty's Government to the Government of Indonesia.

'I am able to say that the Hong Kong Government follows Her Majesty's Government in the United Kingdom by recognizing that Consuls and diplomatic couriers cannot be compelled to give evidence about matters within the scope of their official duties. The question, my Lord, how far this privilege is pertinent in the proceedings before your Lordship or what is the effect of its being put forward after evidence has been filed or any further question which might arise if the privilege is claimed are in my view questions for your Lordship and I do not therefore propose to say anything further in that connection. . . .'

"From this statement it becomes very clear that Her Majesty's Government had not recognized Mr. Kwee Djie Hoo's diplomatic immunity, as was stated by Mr. McNeill. Although the statement made it clear that Her Majesty's Government recognizes that consuls and diplomatic couriers cannot be compelled to give evidence about matters within the scope of their official duties, it seems to me that the statement of the learned Attorney-General added nothing about the status of consuls and couriers beyond what I have already stated in my decision on the claim to diplomatic immunity made on behalf of Mr. Kwee and Major Pamoerhardjo.

"After the statement by the learned Attorney-General, Mr. McNeill informed the Court that Mr. Kwee claimed

absolute immunity from cross-examination on the affidavits filed by him, as also did Major Pamoerhardjo. He went on to say that the Indonesian Government had instructed Mr. Kwee that, upon it being established that he was not compelled to come into Court and be cross-examined, he was to offer himself for cross-examination in the Consulate. In other words, the Government of Indonesia is prepared to waive what it calls Mr. Kwee's immunity if the Court made an order for his cross-examination in the precincts of his Consulate, but if the Court did not condescend to come to the Consulate for the purpose of cross-examining Mr. Kwee, then Mr. Kwee adheres to his claim to immunity. Mr. McNeill said his remarks applied equally to Major Pamoerhardjo.

"The effect of Mr. McNeill's remarks seems to me to be this. If the Court recognizes that Mr. Kwee and Major Pamoerhardjo have immunity to the extent that they cannot be compelled to come to Court to be cross-examined on the affidavits they have filed in the actions before the Court, then the Indonesian Government has instructed them to waive that immunity on condition that the Court sends an officer of the Court to cross-examine them in the Indonesian Consulate. I must firstly remark that it is incumbent on me to say that I do not recognize any such immunity; for I have so held in a decision already given in this action, which decision has not been set aside, that neither Mr. Kwee nor Major Pamoerhardjo is entitled to the immunity claimed. I have no intention of now going back upon that decision. Secondly, I will again repeat that my order for cross-examination of both these gentlemen, though the subject of an appeal before the Full Court, still stands. But, so far as Mr. Kwee is concerned, it is not my intention in the circumstances to compel him to attend before the Court, although I deem him in contempt for refusing to obey the order of the Court. With respect to the directions which Mr. McNeill states Mr. Kwee has received from the Government of Indonesia, to waive his immunity partially and submit to cross-examination if the Court varies its original order and directs an officer to conduct the examination in the Indonesian Consulate, I will repeat what I have already said, *viz.*, that this Court has no intention of bowing to the dictates of the Indonesian Government. If the Indonesian Government is directing Mr. Kwee to waive the alleged immunity which it claims he has, then Mr. Kwee must either waive that immunity and submit to the jurisdiction of this Court entirely or not at all. For I have never before heard of such a thing as a partial waiver of one's legal rights. It is indeed a novel proposition of law. But Mr. McNeill has informed the Court that Mr. Kwee will not waive that alleged immunity unless the Court directs

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the cross-examination in the Consulate. It is only too clear that Mr. Kwee wants to make the best of two worlds. He cannot, for this Court has no intention of going to the Indonesian Consulate or of sending any of its officers to the Consulate to cross-examine Mr. Kwee. I have said that in the circumstances I have no intention of compelling Mr. Kwee to come to Court, and thus the position is that Mr. Kwee refuses to be cross-examined and his Government must abide by the consequences of such refusal.

“As for Major Pamoerhardjo, I have been informed that he left the country on the morning of Saturday, September 6, being recalled by his Government. I do not propose to make any observations at this stage about this gentleman, except to say that had he remained in Hong Kong and continued to disobey the order of the Court to attend, he would not have received the same courteous treatment now being extended to Mr. Kwee as Consul-General, and that a warrant would have been issued to compel his attendance in obedience to the Court’s order. He has, however, been removed from all possibility of being cross-examined.”

In consequence of these circumstances, the Court ordered that the affidavits of Mr. Kwee and Major Pamoerhardjo be removed from the record of proceedings and, as a result, the evidence contained therein was no longer available to support the claim of the Indonesian Government.

[Reports: (1952) 35 H.K.L.R. 242 and 288.]

PART VIII

TREATIES

I.—Conception and Function of Treaties

Treaties—Conception of—Agreements with Collective Organ of Occupying Powers—The “Petersberg Agreement” between the Allied High Commission for Germany and the German Federal Republic—Whether a Treaty in the Accepted Sense—The Constitutional Law of Germany. Case No. 95

THE PETERSBERG AGREEMENT CASE.

German Federal Republic, Federal Constitutional Court.
July 29, 1952.

THE FACTS.—Article 59 (2) of the Constitution of the German Federal Republic provides as follows:—

“Treaties which govern the political relations of the Federal Republic . . . require the consent . . . of the organs competent for the enactment of federal law . . .”

On November 22, 1949, the Federal Republic of Germany, of the one part, and the High Commissioners of three of the Powers occupying the territory of the Federal Republic (France, the United Kingdom and the United States of America), of the other part, concluded the “Petersberg Agreement”. This Agreement was intended to govern the legal relations between the three-Power Allied High Commission and the Federal Republic while the latter remained under Allied occupation, and it dealt exclusively with matters relating to the occupation régime. The Government of the Federal Republic did not submit the Agreement for parliamentary approval, and the parliamentary section of the Social-Democratic Party thereupon instituted proceedings before the Federal Constitutional Court, the contention being that the Agreement was a treaty in the accepted sense and within the meaning of Article 59 (2) of the Federal Constitution and therefore invalid without parliamentary approval. The Government of the Federal Republic contended that the Agreement was not a “treaty”, the latter term being applicable only to agreements with other States and not to agreements with the collective organ of the Occupying Powers, and that accordingly the Agreement was valid without parliamentary approval.

Held: that as the “Petersberg Agreement” was not an Agreement with another State or States, it was not a treaty

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within the meaning of Article 59 (2) of the Constitution, and was therefore valid without parliamentary approval. The Court said:

"We must proceed on the premiss that the Petersberg Agreement is a treaty, notwithstanding that it has been concluded under the occupation régime which is superimposed upon the German State. This Treaty has not been concluded between the Federal Republic of Germany, of the one part, and France, the United Kingdom and the United States, of the other part. The Contracting Party on the other side was the Allied High Commission, acting as the collective organ of the three Occupying Powers. The three High Commissioners did not act as the representatives of their respective countries. The Agreement of April 8, 1949, created the system of three-Power control and the Allied High Commission as the highest Allied control organ. In accordance with its statute of June 20, 1949, the Allied High Commission was set up in order to exercise supreme *Allied* power in the Federal Republic; it exercises control over the Government of the Federal Republic in accordance with the provisions of the Occupation Statute. Therefore, the Allied High Commission is not an organ of the individual States by whom it was set up, but a collective organ, within the meaning of international law, of the Occupying Powers. In its nature the Agreement thus partakes of international law, but it is an agreement between the collective organ of the Occupying Powers, of the one part, and the Government of the Federal Republic of Germany, of the other part.

"A Treaty between the Federal Government and the Allied High Commission does not fall within the purview of Article 59 of the Constitution. The latter provision applies only to treaties with foreign States. Although certain international organizations must be regarded in the same light as foreign States, the highest Allied control organ in Germany occupies a position *vis-à-vis* the Federal Government which precludes its being regarded in the same light as a foreign State. The Occupying Powers exercise supreme power *in* Germany through the instrumentality of the Allied High Commission. A collective organ within the purview of international law which exercises power in Germany while a formal state of war continues cannot be regarded as a foreign State *vis-à-vis* the Federal Republic of Germany. The Petersberg Agreement is concerned exclusively with matters which had to be dealt with by reason of the existence of the occupation régime and while the latter subsists. It deals with subjects for which the Occupying Powers, by virtue of their powers as Occupants, and the Government of the Federal Republic, by

virtue of the Constitution, claim the right to make provision. For this reason, the Agreement is not an Agreement between the Federal Republic of Germany and foreign Powers or foreign States within the meaning of Article 59 of the Constitution. In this respect the circumstances are different from those underlying the Agreement of June 28, 1919, between Germany and the United States of America, Belgium, the United Kingdom and France concerning the military occupation of the Rhineland. At that time the German Reich was not subject to the powers of an Occupant. A German Government whose freedom of action in international law was not subject to restrictions concluded an Agreement with foreign States concerning the occupation of a portion of Reich territory, the Agreement being concluded simultaneously with the Peace Treaty. . . .

"Article 59 (2) of the Constitution deviates from the system of the separation of powers in that the legislature here makes inroads on the powers of the executive. The fact that Article 59 does not make express provision for the relationship *vis-à-vis* the Occupying Power does not mean that it contains a gap in this respect. It is not Article 59 (2) which contains a gap in this respect, but the whole structure of the Constitution."

The judgment then pointed out that the Constitution of the Federal Republic was intended to be the Constitution of a sovereign State and that it therefore deliberately omitted any reference to the occupation régime. It then continued as follows:

"In the result we reach the conclusion that agreements with the Occupying Powers *as such* do not fall within the purview of Article 59 of the Constitution, so that there is no need for Parliament to create the conditions necessary for ratification. The position is quite different in cases where a foreign State which is an Occupying Power acts not in the latter capacity, but in order to conclude agreements on matters unconnected with the fact of occupation. Thus the Federal Parliament gave its consent in the form of federal laws to the Agreement on Economic Co-operation between the United States of America and the Federal Republic of Germany and the accession of the Federal Republic to membership of the Council of Europe."

[Report: JZ, 7 (1952), p. 559.]

II.—Forms of International Agreements

Treaties. Conventions. Governmental Agreements.
Exchanges of Notes. Other Forms of Treaties.

Case No. 96 Treaties—Forms of—Declaration Annexed to Treaty—Retro-active Operation—Interpretation of Treaties—Effectiveness of Arbitration Clause.

AMBATIELOS CASE.
(*Greece v. United Kingdom*)
(Preliminary Objection.)
International Court of Justice.

(Sir Arnold McNair, President; Guerrero, Vice-President; Alvarez, Basdevant, Hackworth, Winiarski, Zoričić, Klaestad, Badawi Pasha, Read, Hsu Mo, Levi Carneiro, Sir Benegal Rau, Armand-Ugon, Judges; M. Spiropoulos, Judge *ad hoc.*)

Judgment of July 1, 1952.

THE FACTS (as stated by the Court).—"On April 9, 1951, the Greek Minister in the Netherlands, duly authorized by his Government, filed in the Registry an Application instituting proceedings before the Court against the United Kingdom of Great Britain and Northern Ireland concerning the claim relating to the rights of a Greek shipowner, Nicolas Eustache Ambatielos, alleged to have suffered considerable loss in consequence of a contract which he concluded in 1919 with the Government of the United Kingdom (represented by the Ministry of Shipping) for the purchase of nine steamships which were then under construction, and in consequence of certain adverse judicial decisions in the English Courts in connection therewith.

"The Hellenic Application refers to the Treaty of Commerce and Navigation between Greece and Great Britain, signed at Athens on November 10, 1886, and to the Treaty of Commerce and Navigation between the same Contracting Parties signed at London on July 16, 1926, including the Declaration. The Application requests the Court:

'To declare that it has jurisdiction:

'To adjudge and declare . . .

- '1. That the arbitral procedure referred to in the Final Protocol of the Treaty of 1886 must receive application in the present case;
- '2. That the Commission of Arbitration provided for in the said Protocol shall be constituted within a reasonable period, to be fixed by the Court.'

“The Treaty provisions herein before mentioned are as follows: Treaty of Commerce and Navigation of November 10, 1886

‘*Article I.*—There shall be between the dominions and possessions of the two High Contracting Parties reciprocal freedom of commerce and navigation. The subjects of each of the two Parties shall have liberty freely to come, with their ships and cargoes, to all places, ports and rivers in the dominions and possessions of the other to which native subjects generally are or may be permitted to come, and shall enjoy respectively the same rights, privileges, liberties, favours, immunities and exemptions in matters of commerce and navigation which are or may be enjoyed by native subjects without having to pay any tax or impost greater than those paid by the same, and they shall be subject to the laws and regulations in force.

‘*Article X.*—The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most-favoured nation.

‘*Article XV.*—The dwellings, manufactories, warehouses and shops of the subjects of each of the Contracting Parties in the dominions and possessions of the other, and all premises appertaining thereto destined for purposes of residence or commerce shall be respected.

‘It shall not be allowable to proceed to make a search of, or a domiciliary visit to, such dwellings and premises, or to examine and inspect books, papers, or accounts, except under the conditions and with the form prescribed by the laws for subjects of the country.

‘The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access to the Courts of Justice for the prosecution and defence of their rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys or agents, from among the persons admitted to the exercise of those professions according to the laws of the country.’

Protocol of November 10, 1886

‘At the moment of proceeding this day to the signature of the Treaty of Commerce and Navigation between Great Britain and Greece, the Plenipotentiaries of the two High Contracting Parties have declared as follows:

‘Any controversies which may arise respecting the interpretation or the execution of the present Treaty, or the consequences of any violation thereof, shall be submitted, when the

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means of settling them directly by amicable agreement are exhausted, to the decision of Commissions of Arbitration, and the result of such arbitration shall be binding upon both Governments.

‘The members of such Commissions shall be selected by the two Governments by common consent, failing which each of the Parties shall nominate an Arbitrator, or an equal number of Arbitrators, and the Arbitrators thus appointed shall select an Umpire.

‘The procedure of the Arbitration shall in each case be determined by the Contracting Parties, failing which the Commission of Arbitration shall be itself entitled to determine it beforehand.

‘The undersigned Plenipotentiaries have agreed that this Protocol shall be submitted to the two High Contracting Parties at the same time as the Treaty, and that when the Treaty is ratified, the agreements contained in the Protocol shall also equally be considered as approved, without the necessity of a further formal ratification.’

Treaty of Commerce and Navigation of July 16, 1926

‘Article 1.—There shall be between the territories of the two Contracting Parties reciprocal freedom of commerce and navigation.

‘The subjects or citizens of each of the two Contracting Parties shall have liberty freely to come with their ships and cargoes, to all places and ports in the territories of the other to which subjects or citizens of that Contracting Party are, or may be, permitted to come, and shall enjoy the same rights, privileges, liberties, favours, immunities and exemptions in matters of commerce and navigation as are, or may be, enjoyed by subjects or citizens of that Contracting Party.

‘Article 3.—The subjects or citizens of each of the two Contracting Parties in the territories of the other shall enjoy, in respect of their persons, their property, rights and interest, and in respect of their commerce, industry, profession, occupation, or any other matter, in every way the same treatment and legal protection as the subjects or citizens of that Party or of the most-favoured foreign country, in as far as taxes, rates, customs, imposts, fees which are substantially taxes, and other similar charges are concerned.

‘Article 4.—The two Contracting Parties agree that in all matters relating to commerce, navigation and industry and the exercise of professions or occupations, any privileges, favour or immunity which either of the two Contracting Parties has actually granted, or may hereafter grant, to the ships and subjects or citizens of any other foreign country shall be extended, simultaneously and unconditionally, without request and without compensation, to the ships and subjects or citizens of the other, it being their intention that the commerce, navigation and industry of each of the two Contracting Parties shall be placed in all respects on the footing of the most-favoured nation.

'Article 29.—The two Contracting Parties agree in principle that any dispute that may arise between them as to the proper interpretation or application of any of the provisions of the present Treaty shall, at the request of either Party, be referred to arbitration.

'The court of arbitration to which disputes shall be referred shall be the Permanent Court of International Justice at The Hague, unless in any particular case the two Contracting Parties agree otherwise.'

Declaration of July 16, 1926

'It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886, and that any differences which may arise between our two Governments as to the validity of such claims shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of November 10, 1886, annexed to the said Treaty.'

'... The United Kingdom Government's final Submission is that the Court 'has no jurisdiction to deal with the claim brought against the Government of the United Kingdom by the Hellenic Government in respect of the treatment of M. Ambatielos'. The Submissions in the Counter-Memorial of the United Kingdom were more detailed. So far as they related to jurisdiction, with which alone the Court is now concerned, they were:

- '(i) That for certain reasons the Court has no jurisdiction*
'(a) to entertain a request by the Hellenic Government that it should order the United Kingdom Government to submit to arbitration a claim by the Hellenic Government based on Article XV or any other article of the Treaty of 1886, or,
'(b) itself to decide on the merits of such a claim.

- '(ii) That for certain reasons, the Court has no jurisdiction*
'(a) to entertain a request by the Hellenic Government that it should order the United Kingdom Government to submit to arbitration a claim by the Hellenic Government for denial of justice based on the general principles of international law or for unjust enrichment, or,

'(b) itself to decide upon the merits of such a claim.'

"The brief but comprehensive final Submission obviously includes the jurisdictional objections more particularly set out in the Counter-Memorial.

"It is evident from the above summary that, apart from the jurisdiction of the Court on the merits, the question of its

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jurisdiction to decide upon the obligation to submit the difference to arbitration is implicit in the final Submissions of both Parties.”

Adjudicating upon the Preliminary Objection filed by the Government of the United Kingdom of Great Britain and Northern Ireland to the Application of the Royal Hellenic Government,

Held (by thirteen votes to two): that the Court was without jurisdiction to decide on the merits of the Ambatielos claim;

(by ten votes to five): that the Court had jurisdiction to decide whether the United Kingdom was under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim, in so far as this claim was based on the Treaty of 1886.

The Court said:

“The Court can now proceed to deal with the various arguments put forward by the United Kingdom Government in support of its Preliminary Objection to the Court’s jurisdiction. Seven main points have been raised, the first two of which are:

- ‘(1) The jurisdiction of the Court, if it exists at all, must be derived from Article 29 of the Treaty of 1926.
- ‘(2) Article 29 of the Treaty of 1926 only confers jurisdiction on the Court to deal with disputes relating to the interpretation or application of the provisions of the Treaty of 1926 itself.’

“Greece has not accepted the compulsory jurisdiction of the Court under Article 36 (2) of its Statute and therefore can invoke the jurisdiction of the Court only under Article 36 (1), by virtue of a special agreement or the provisions of a treaty. The Hellenic Government relies, in the present case, on Article 29 of the Treaty of 1926, read in the light of Article 37 of the Statute of the Court, which in effect provides that all references in treaties to the Permanent Court of International Justice must now be construed as references to the International Court of Justice. Article 29 of the Treaty of 1926 between Great Britain and Greece is in the following terms:

‘The two Contracting Parties agree in principle that any dispute that may arise between them as to the proper interpretation or application of any of the provisions of the present Treaty shall, at the request of either Party, be referred to arbitration.

‘The court of arbitration to which disputes shall be referred shall be the Permanent Court of International Justice at The Hague, unless in any particular case the two Contracting Parties agree otherwise.’

“ It follows, therefore, that any dispute as to the interpretation or application of any of the provisions of the Treaty of 1926 is referable by either Party to this Court.

“ The third and fourth points raised on behalf of the United Kingdom Government are that:

- ‘ (3) The Treaty of 1926 only came into force in July 1926, and none of its provisions are applicable to events which took place or acts which were committed before that date. This is so whether or not the 1886 Treaty, which the Treaty of 1926 replaced, contained provisions similar to those of the Treaty of 1926.
- ‘ (4) The acts on which the Greek Government’s claim is based took place in 1922 and 1923, and therefore the provisions of the Treaty of 1926 are not applicable to them.’

[I. *Retroactive Operation of the Treaty.*]—“ These points raise the question of the retroactive operation of the Treaty of 1926 and are intended to meet what was described during the hearings as ‘ the similar clauses theory ’, advanced on behalf of the Hellenic Government. The theory is that where in the 1926 Treaty there are substantive provisions similar to substantive provisions of the 1886 Treaty, then under Article 29 of the 1926 Treaty this Court can adjudicate upon the validity of a claim based on an alleged breach of any of these similar provisions, even if the alleged breach took place wholly before the new Treaty came into force. The Court cannot accept this theory for the following reasons:

“ (i) To accept this theory would mean giving retroactive effect to Article 29 of the Treaty of 1926, whereas Article 32 of this Treaty states that the Treaty, which must mean all the provisions of the Treaty, shall come into force immediately upon ratification. Such a conclusion might have been rebutted if there had been any special clause or any special object necessitating retroactive interpretation. There is no such clause or object in the present case. It is therefore impossible to hold that any of its provisions must be deemed to have been in force earlier.

“ It was contended on behalf of the Hellenic Government that the arbitral procedure stipulated in Article 29 of the Treaty of 1926 differed from that in the Protocol of 1886 only in respect of the tribunal provided for arbitration: under the Treaty of 1926 the arbitral tribunal was to be the Permanent Court of International Justice, while under the Protocol of 1886 the tribunal was to be an *ad hoc* commission of arbitration. This, it was argued, was a procedural variation and in matters

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of procedure, at least in English law, the presumption as to procedural statutes is in favour of retroactive application. Now, whatever may be the position in national law in various countries of the world—a matter which the Court has not thought it necessary to investigate—and without examining whether questions of procedure cover questions of jurisdiction, the Court observes that, in any event, the language of Article 32 of the Treaty of 1926 precludes any retroactive effect being given to selected provisions of that Treaty.

“(ii) Accompanying the Treaty of 1926—whether as a part thereof or not is a question which will be dealt with later—was a Declaration which provided, in effect, that any differences which might arise as to the validity of claims based on the Treaty of 1886 should be referred, at the request of either Government, to arbitration under the Protocol annexed to the Treaty of 1886. That was the understanding between the Parties. The language of the Declaration makes no distinction between claims based on one class of provisions of the 1886 Treaty and those based on another class; they are all placed on the same footing and differences relating to their validity are referable to arbitration under the Protocol of 1886. To argue that differences relating to claims based on those of the provisions of the earlier Treaty, which were similar to provisions of the later Treaty, were intended to be referred to arbitration in accordance with Article 29 of the later Treaty, while differences relating to other claims based on the earlier Treaty were meant to be arbitrated under the Protocol of the earlier Treaty, introduces a distinction for which the Court sees no justification in the plain language of the Declaration.

[II. *Annexed Declaration as Part of the Treaty.*]—“The fifth point raised on behalf of the United Kingdom Government is that:

‘The Declaration which was signed at the same time as the Treaty of 1926 was not a part of that Treaty and the provisions of that Declaration are not provisions of that Treaty within the meaning of Article 29.’

“Both Parties agree that this is the most important issue in the case. In support of the contention that the Declaration is not a part of the Treaty, it is said that the Declaration was signed separately from the Treaty proper, though by the same signatories and on the same day. It is also pointed out that the Declaration refers to the Treaty not as ‘this Treaty’ or ‘the present Treaty’—which would have been the proper mode of reference if the Declaration had been regarded as part of the Treaty—but as ‘the Treaty . . . of to-day’s date’, thereby indicating that the Treaty had already been completed

and signed. Moreover, it is urged, the Declaration does not say that it is to be regarded as a part of the Treaty, presenting in this respect a marked contrast to one of the Declarations annexed to the Greco-Italian Commercial Treaty of November 24, 1926, which is followed by two Declarations, one expressed to be an integral part of the Treaty and the other not so expressed, the latter being almost identical in form and purpose with the 1926 Anglo-Greek Declaration with which the Court is now concerned.

" On the other hand, it is to be noted that the Plenipotentiaries included the Treaty and the Customs Schedule (which is unquestionably a part of the Treaty) and the Declaration in a single document of forty-four pages, the Declaration being on p. 44. Again, shortly after the exchange of ratifications, the Government of the United Kingdom issued *Treaty Series No. 2* (1927), a single document entitled 'Treaty of Commerce and Navigation between the United Kingdom and Greece and accompanying Declaration', and presented it to Parliament. Furthermore, the British Foreign Office and the Chargé d'Affaires of the Hellenic Republic at Berne communicated official texts to the League of Nations at Geneva for registration, which led to their inclusion in the *League of Nations Treaty Series* under a single number, as 'No. 1425. Treaty of Commerce and Navigation between the United Kingdom and Greece and accompanying Declaration signed at London, July 16, 1926'.

" Cogent evidence as to what both Parties intended is furnished by the instruments of ratification exchanged between the United Kingdom and Greece. The instrument of ratification by Greece was in the following terms: 'We declare that the Treaty of Commerce and Navigation having been signed in London on July 16 of this year between Greece and Great Britain with annexed Customs Schedule and Declaration, the texts of which follow: [Here follow the Greek and English texts of the Treaty, Schedule and Declaration.] We accept, approve and ratify the Treaty, the Customs Schedule and the Declaration in all their provisions, promising to faithfully observe and not to violate the same, or to permit their violation by any other person whatsoever', etc.

" Thus, this instrument made no distinction between the Treaty on the one hand, and the Customs Schedule which is indisputably a part of the Treaty, and the Declaration annexed to the Treaty, on the other. It is clear, therefore, that Greece treated the Declaration as a part of the Treaty.

" The United Kingdom's instrument of ratification is even more explicit. It reads: 'GEORGE, by the Grace of God . . . greeting. Whereas a Treaty between Us and Our good friend

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the President of the Hellenic Republic, relative to commerce and navigation, was concluded and signed at London on the sixteenth day of July in the year of Our Lord one thousand nine hundred and twenty-six by the Plenipotentiaries of Us and of Our said good friend duly and respectively authorized for that purpose, which Treaty is, word for word, as follows: [here follow the English and Greek texts of the Treaty, Schedule and Declaration.]

‘We, having seen and considered the Treaty aforesaid, have approved, accepted and confirmed the same in all and every one of its articles and clauses’, etc.

“From the words ‘which Treaty is, word for word, as follows’ and the text that follows the words, it is clear that the United Kingdom also regarded the Declaration, as well as the Customs Schedule, as included in the Treaty. The ratification of a Treaty which provides for ratification, as does the Treaty of 1926, is an indispensable condition for bringing it into operation. It is not, therefore, a mere formal act, but an act of vital importance. When the Government of the United Kingdom speaks of the Treaty in its own instrument of ratification, as being ‘word for word as follows’ and includes the Declaration in the text that follows, it is not possible for the Court to hold that the Declaration is not included in the Treaty.

“The nature of the Declaration also points to the same conclusion. It records an understanding arrived at by the Parties before the Treaty of 1926 was signed as to what the Treaty, or as Counsel for the Government of the United Kingdom preferred to put it, the replacement of the Treaty of 1886 by the Treaty of 1926, would not prejudice. This is clear from the opening words ‘It is well understood that the Treaty. . . of to-day’s date, does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886’. From the series of instruments which from time to time continued the Treaty of 1886 in force after its initial denunciation by Greece, it is evident that ultimately it was the coming into force of the Treaty of 1926 that finally terminated the operation of the Treaty of 1886. But for the Declaration, Article 32 of the Treaty of 1926, which brought that Treaty into force upon ratification, might, in the absence of any saving clause, have been regarded as putting the Treaty into full operation so as completely to wipe out the Treaty of 1886 and all its provisions, including its remedial provisions, and any claims based thereon. Indeed, the United Kingdom Government, before proceeding to the signature of the Treaty of 1926, asked for an assurance that the Hellenic Government would not regard ‘the conclusion of the Treaty’ as prejudicing certain claims of British subjects

based on the older Treaty. The intention of the Declaration was to prevent the new Treaty from being interpreted as coming into full force in this sweeping manner and thus prejudicing claims based on the older Treaty or the remedies provided for them. It follows that, for the proper interpretation or application of the provisions of the Treaty of 1926, some such words as 'Save as provided in the Declaration annexed to this Treaty' have to be read into Article 32 before the words 'It shall come into force'. Thus, the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty, even if this was not stated in terms.

"For these reasons, the Court holds that either expressly (by virtue of the United Kingdom's own instrument of ratification) or by necessary implication (from the very nature of the Declaration) the provisions of the Declaration are provisions of the Treaty within the meaning of Article 29. Consequently, this Court has jurisdiction to decide any dispute as to the interpretation or application of the Declaration and, in a proper case, to adjudge that there should be a reference to a Commission of Arbitration. Any differences as to the validity of the claims involved will, however, have to be arbitrated, as provided in the Declaration itself, by the Commission.

"It may seem at first sight that there is here a possibility of a conflict between a decision of the Court finding that there is an obligation to submit a difference to a Commission of Arbitration and an eventual decision by the Commission. There is in reality no such possibility.

"The Court would decide whether there is a difference between the Parties within the meaning of the Declaration of 1926. Should the Court find that there is such a difference, the Commission of Arbitration would decide on the merits of the difference.

"It may be contended that because a special provision overrides a general provision, the Declaration should override Article 29 of the Treaty of 1926 and, as it lays down a special arbitral procedure, it excludes the jurisdiction of the Court under Article 29. While it is true that the Declaration excludes the Court from functioning as the Commission of Arbitration, it is equally true that it lies with the Court to decide precisely whether there should be a reference to a Commission of Arbitration."

[III. *Comprehensiveness of Arbitration Clauses.*] —"The sixth argument of the United Kingdom Government is that:

'The claim which the Greek Government is making on behalf of M. Ambatielos in so far as it is based on any

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provision of the Treaty of 1886, is not a claim covered by the Declaration of 1926, because that Declaration only covered claims which had been formulated under that Treaty before the Declaration was signed, and the Greek Government did not formulate any legal claim in respect of M. Ambatielos until 1933, nor indeed any legal claim under the Treaty of 1886 until 1939.'

" The phrase used in the Declaration is ' claims based on the provisions of the Anglo-Greek Commercial Treaty of 1886 '. There is no reference whatever in the Declaration to the date of formulation of the claims; the only requirement is that they should be based on the Treaty of 1886. Counsel for the United Kingdom attempted to support his contention by referring to the negotiations which led to the signature of the Declaration. The records of the negotiations, however, do not support the contention. They show that although the Hellenic Government originally suggested a draft of the Declaration referring to ' anterior claims eventually deriving from the Anglo-Greek Commercial Treaty of 1886 ', this draft was ultimately not accepted, and both Parties adopted, instead, the text of the Declaration as it now appears, omitting the word *anterior*. In any case where, as here, the text to be interpreted is clear, there is no occasion to resort to preparatory work.

" If the United Kingdom Government's interpretation were accepted, claims based on the Treaty of 1886, but brought after the conclusion of the Treaty of 1926 would be left without solution. They would not be subject to arbitration under either Treaty, although the provision on whose breach the claim was based might appear in both and might thus have been in force without a break since 1886. The Court cannot accept an interpretation which would have a result obviously contrary to the language of the Declaration and to the continuous will of both Parties to submit all differences to arbitration of one kind or another.

" There now remains the final argument that ' the Treaty of 1886 contains no provisions incorporating in the Treaty the general principles of international law with regard to the treatment of foreigners in courts of justice or otherwise and in consequence it cannot be said that the alleged denial of justice in breach of the general principles of international law is a breach of the Treaty of 1886, merely because it is a breach of the general principles of international law '.

" The point raised here has not yet been fully argued by the Parties, and cannot, therefore, be decided at this stage."

[Report: *I.C.J. Reports*, 1952, p. 28.]

In his Individual Opinion Judge Levi Carneiro said:

" Though I have voted with the majority on nearly all the questions and have accepted the conclusions of the Judgment, I nevertheless venture to draw attention to some secondary differences of view, and to refer to certain considerations which have influenced my attitude in regard to questions which have been raised, but which have not been dealt with in the Judgment.

" 2. It has been decided not to join the Objection to the merits, in conformity with Article 62, paragraph 5, of the Rules of Court, as had been requested by one of the Parties.

" I consider that such a joinder should only be made when it is absolutely necessary. However, it often happens that, although no joinder is made, the decision on the jurisdiction involves a summary, superficial, or *prima facie* consideration of certain questions pertaining to the merits. Such an examination is mainly confined to the legal issues, without dealing with the facts that are in dispute, and the decision on the jurisdiction may then be founded on considerations which touch upon these questions, without dealing exhaustively with them and without prejudging them.

" 3. In my opinion, in order to establish the Court's jurisdiction in the present case, it should have been decided that the Ambatielos claim is ' based ' on the Treaty of November 10, 1886—that is to say, that it has given rise, in the words of the Protocol of the same date, to a controversy ' respecting the interpretation or the execution ' of the Treaty.

" The United Kingdom Counter-Memorial has correctly indicated the line of argument by which the Hellenic Government justifies the Court's jurisdiction:

' . . . it contends that the treatment accorded to the claimant gave rise to a claim against the United Kingdom *under Article XV of the Treaty of 1886*; that, since the United Kingdom rejects this claim, it should be submitted to arbitration under the Protocol annexed to that Treaty and continued in force after the termination of the Treaty by the Declaration made on the date of signature of the Treaty of 1926; and finally that the refusal of the United Kingdom to go to arbitration raises a dispute as to the application of the Declaration which the Court has jurisdiction to decide under Article 29 of the Treaty of 1926 ' (paragraph 10, British Counter-Memorial) (my italics).

" Certainly, the Hellenic Government's argument was correctly summarized in that passage. The Greek Memorial expressly contended that there had been a violation of Article XV, paragraph 3, of the Treaty of 1886, consisting of a denial of justice, and of Article X of the said Treaty, consisting of inequality of treatment (Memorial, paragraphs 14 and 22).

" The invocation of these provisions of the Treaty seems to be relevant. Without passing on the facts stated in the Memorial, or recognizing the correctness of these allegations, it would not be possible to say whether the invocation of the clauses of the Treaty of 1886 was justified. The Court cannot do so at the present stage of the proceedings. However, this invocation must, *prima facie*, be regarded as acceptable. That is both sufficient and necessary to enable the Court's jurisdiction to be asserted. If the claim manifestly went beyond the terms of the Treaty of 1886, the Court would have no jurisdiction. For example, if the claim related to facts prior to the Treaty of 1886, the Court's lack of jurisdiction would have to be at once admitted; the

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invocation of this Treaty would—even *prima facie*—appear to be ill-founded. In fact, what has to be decided is simply whether the claim is or is not *admitted* by the Treaty.

"4. In the present case, recognition of the fact that the claim is based on the Treaty of 1886 follows from the declarations of the Parties.

"In the Counter-Memorial (paragraph 11), after the summary of the Hellenic Government's reasoning, which I have quoted above, the Agent for the United Kingdom Government submitted that this reasoning ought to be rejected because:

'(a) the Declaration does not form part of the Treaty of 1926 and Article 29 of the Treaty is therefore not applicable to it, and because

'(b) the Declaration was only intended to apply to claims brought before the date of its signature (July 16, 1926).'

"The British Government did not reject the reasoning on the ground that the claim was not based on the Treaty of 1886, although it disputed the denial of justice and the inequality of treatment. On the contrary, it admitted that the claim was, *prima facie*, based on the Treaty of 1886.

"Its first submission was that the Court:

'has no jurisdiction to entertain a request by the Hellenic Government that it should order the United Kingdom Government to submit to arbitration a claim by the Hellenic Government based on Article XV or any other Article of the Treaty of 1886'.

"Subsequently, during the oral proceedings before the Court, the recognition of this fact became quite clear. Counsel for the United Kingdom, at the hearing on May 15, stated the conditions which he regarded as necessary for the admission of the Court's jurisdiction: (1) that the Declaration was a provision of the Treaty of 1926; (2) that the Greek claim was both 'based on the Treaty of 1886' and covered by the Declaration (Oral Argument, p. 16). He sought to show that the Declaration did not form part of the Treaty of 1926, and that it did not cover the claim; but he did not attempt to show that the claim was not based on the Treaty of 1886.

"In conclusion, the Greek Counsel said:

'... even our opponents agreed that our legal bases included at least one which they recognized as pertinent: that was Article XV, paragraph 3, of the Treaty of 1886 ...'.

"I think that this fact should have been recognized. The Court's jurisdiction results from the fact that the dispute is within the framework of the Declaration of 1926: the claim is 'based' on the Treaty of 1886.

"5. It might perhaps have been possible to anticipate the final decision of this case by at once affirming—or denying—the obligation of the United Kingdom Government to submit to arbitration its dispute with the Hellenic Government in regard to M. Ambatielos's claim.

"The fullness of the arguments appeared to allow of such a decision—and I myself was in favour of giving it. I now recognize that the present Judgment deals solely with the Objection to the jurisdiction. In presenting it, the British Government very clearly separated the question of jurisdiction from the question of the merits. In regard to the latter, it said that the claim of the Hellenic Government was barred by reason of the delay in its submission, and that the Court

should, in accordance with the Hellenic Government's proposal, substitute itself for the Arbitration Commission, etc. On the preliminary question, what was alleged was the Court's lack of jurisdiction to order the British Government to submit to arbitration a claim by the Hellenic Government, etc.

"The present decision of the Court, in its Judgment on the Preliminary Objection, is limited to an affirmation of its competence to give the ruling referred to.

"Subsequently, in the next stage of the procedure, the Hellenic Government's request will be adjudicated upon. Then, and only then, will the Court be in a position to adjudge and declare, as requested by the Hellenic Government:

'that the United Kingdom Government is under an obligation to refer its present dispute with the Hellenic Government to arbitration . . . '.

"It is true that the Hellenic Government itself, in its 'Observations and Submissions' departed from this attitude and asked the Court

'to hold that the United Kingdom Government is bound to accept the submission to the International Court of Justice, sitting as an arbitral tribunal, of the dispute now existing between that Government and the Hellenic Government, and accordingly to fix time-limits for the filing by the Parties of the Reply and the Rejoinder dealing with the merits of the dispute'.

"A modification resulted from the acceptance by Counsel of the two Parties, during the oral proceedings, of the principle that the Court should exercise the functions of the Commission of Arbitration referred to in the Protocol of 1886. This proposal, which was proposed by Counsel for the Hellenic Government, was accepted by the United Kingdom Counsel, subject to the condition that the Court should first hold that it was competent. It has been very correctly decided in the Judgment that the Court has not thereby been invested with jurisdiction to decide on the merits.

"In my view, it should be declared expressly that the Court could assume the function of the Arbitral Commission as a result of a Special Agreement between the two Governments. The declarations of the Agents, or even of Counsel, in the course of the proceedings, may suffice to establish the competence of the Court, by a prorogation of jurisdiction. However, in the present case, the Court holds that competence belongs to the Commission of Arbitration provided for in the Protocol of 1886. In my opinion, the Court could not agree to any derogation from the clause contained in this inter-governmental agreement on the basis of the mere declarations of Counsel; nor could it admit that jurisdiction to adjudicate on the dispute has been transferred to it by virtue of such declarations.

"In short, in the submission which I have quoted from its 'Observations', the Greek Government envisages, in addition to this proposal regarding the Court's competence—which is unacceptable—the continuation of the proceedings by a Reply and a Rejoinder. This is required by Articles 41, paragraph 2, and 62, paragraph 5, of the Rules of Court, just as Articles 47 *et seq.* call for further oral argument.

"In this second phase, the question whether the claim is based on the Declaration of 1926 will be fully examined. One of the points that will then have to be decided is that raised by Counsel for the United Kingdom in his sixth argument, where he contended that the alleged denial of justice committed in violation of the general principles of international

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law did not constitute a violation of the Treaty of 1886, because this Treaty contained no provision to that effect. I agree that this question ought not to be decided at the present stage of the proceedings, but not on the ground that it has not yet been fully argued by the Parties. That omission by the Parties might be interpreted by the Court; but I consider that it would not be a ground for failing to decide this question, if it were opportune to do so. In fact, it is because this question pertains to the merits of the case that the Court cannot decide it at this time. That is all the more true because it is not necessary to consider this question in order to assert the Court's jurisdiction.

"There will still be a third phase if the Parties agree, only after the end of the second phase, to confer the arbitral function upon the Court.

"The Court's concern not to delay the proceedings cannot be allowed to prevent this prolongation of the case if the Parties do not find means of avoiding it.

"6. The Court's future decision on the merits, being confined to a decision on the question whether the Ambatielos claim falls within the framework of the Declaration of 1926, there is no reason to fear that the judgment of the Commission of Arbitration would conflict with such a decision. The only point which the Court will have to decide will be the competence of that Commission. It is clear that even the Commission itself could not then declare that it lacks jurisdiction. If the Court should hold the Commission competent, it will be for it to decide the sole question of the validity of the Ambatielos claim. If the Commission, its competence having thus been established by the Court, refuses to decide this question, the Court will have to order a new commission to be constituted. Something has been said of the autonomy of the arbitral commissions; in my view, their autonomy is limited by the instrument which institutes them—and in the present case that instrument is constituted by the Judgment of this Court.

"While not exceeding the limits of a decision as to its competence, the Court should not reduce its decision to a doctrinal, abstract or theoretical assertion; it must necessarily relate its decision to the specific case. The Court's jurisdiction is derived from treaties, and from the features of the particular case before it. And so the Court will definitively determine the extent of its jurisdiction and that of any other organ which has to act in the same case.

"7. The most important of the questions submitted is, as has been recognized in the Judgment, whether the Declaration annexed to the Treaty of July 16, 1926, is a part of that Treaty. The Court's reasons in this connection are amply sufficient.

"There is, however, I suppose, some doctrinal interest in emphasizing the juridical nature of this Declaration.

"It is—it must be so described—according to a current expression, an 'interpretative declaration'. Declarations of this sort are often made by one of the parties concerned to define the attitude adopted towards a given treaty, a method of executing it (Fenwick, *International Law*, p. 438; Oppenheim, *International Law*, 6th ed., Vol. 1, p. 787).

"In the *British Year Book of International Law* (1948, pp. 201–202), Mr. A. B. Lyons, referring to a declaration by the French Government on the most-favoured-nation clause, observed that the competent court had 'held that the interpretative declaration must be read with and deemed to form part of the text of the Treaty and was binding on the courts'.

"The Declaration of 1926, which has been referred to, was signed by the same representatives of the two Governments who were signatories of the Treaty of the same date. It has the significance of an

authentic interpretation, embodied in the Treaty itself. The Treaty consists of three parts—Articles, Customs Schedule and Declaration.

" Marcel Sibert has said that a declaration removes various uncertainties from the principles which are considered as the expression of the international law in force. Thus, the Declaration embodied in the Treaty of 1926 removes some uncertainties in regard to the application of that Treaty and of the earlier Treaty which it replaced.

" It is true that the Declaration relates to the Treaty of 1886, in that it saves claims—which have been or may yet be presented—based on the provisions of that Treaty, and ensures the continuity of their remedies in certain cases. Now, this safeguard only became necessary because a new Treaty made its appearance in 1926. Thus, the Declaration restricted the application of the Treaty of 1926 by providing that it should not apply to the cases it mentioned. In virtue of that fact, it could be inserted in the new Treaty, and it forms an integral part thereof; it was so regarded by the two Governments in their instruments of ratification.

" From an intellectual, ideological and juridical point of view, the Declaration forms part of the Treaty of 1926.

" 8. There is another consideration which supports that conclusion: if it were not adopted, there would be no pre-established procedure for the settlement of a dispute between the two Governments on the interpretation and application of the Declaration.

" But such a situation must be avoided, more especially in the case of two friendly nations—like Greece and the United Kingdom—which are united by their love of democracy and of peace: they would not fail to provide for a friendly settlement of disputes which might arise in connection with their two successive commercial treaties. I could never believe that the United Kingdom and Greece, having concluded two Treaties, forty years apart, in the operation of which there was no interruption, motivated by the same solicitude for the safeguarding and assisting of their respective nationals in the territory of the other State, and having expressly provided, in two instruments, for the friendly settlement of their disputes (Protocol annexed to the Treaty of 1886, Article 29 of the Treaty of 1926), should find themselves unable to agree on the application of one of these Treaties, without there being any solution for such disagreement, either by arbitration or by recourse to some organ of international justice.

" 9. I consider such a situation all the more strange and unacceptable because the progress of international law, in its efforts to prevent war and promote international co-operation, is above all directed to the pacific settlements of disputes.

" The interpretation and application of treaties constitute the special domain of arbitration for the very reason that they give rise to purely juridical questions. This was declared by the Second Hague Conference in 1907 and in Article 13 of the Covenant of the League of Nations and now, once more, in Article 36 of the Court's Statute.

" If it is held that the Declaration of July 16, 1926, forms part of the Treaty signed on that day, the difference regarding the interpretation or application of that Declaration must be settled by the International Court of Justice, in accordance with Article 29 of the said Treaty in conjunction with Article 37 of the Statute of the Court.

" 10. In regard to the retroactive application of procedural provisions, and provisions relating to jurisdiction—which the Court has rejected—I venture to add that, in the sphere of international law, such an application can only be allowed when it is expressly provided for. Even when the organ which was formerly competent has been abolished,

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its powers cannot be regarded as automatically transferred to the new organ which replaces it. Thus, in order that this Court might inherit the powers of the Permanent Court of International Justice, it was necessary that this should be expressly laid down in Article 37 of the Statute. But, in the Treaty of 1926, there is no provision abolishing the Arbitral Commissions provided for in the Treaty of 1886. On the contrary, there is nothing to prevent these Commissions from being constituted, should that be necessary. From another point of view, the Declaration annexed to the Treaty of 1926 expressly maintains the means of settlement by arbitration, in accordance with the Protocol annexed to the Treaty of 1886, of disputes based on that Treaty; Article 29 of the Treaty of 1926 limits the powers of the International Court to the settlement of disputes as to the interpretation or application of any of the provisions of the new Treaty. The retroactive application of Article 29 would not be justified and has been expressly excluded.

In his Individual Opinion M. Spiropoulos, Judge *ad hoc*, said, in part:

" Though I am one of the majority, I am unable, to my great regret, to agree with it on all the points considered in and settled by the Judgment. I will confine myself, in what follows, to stating the points on which I disagree with the wording of paragraph 2 of the operative part thereof, in which the Court establishes its jurisdiction to adjudicate on the merits.

" The drafting of paragraph 2 of the operative part would seem to impose upon the applicant State the duty of establishing that the Ambatielos claim ' is based on a provision of the Treaty of 1886 '.

" I differ from the view of the majority for the following reasons:

" The Declaration annexed to the Treaty of 1926 provides that differences between the Parties, as to the validity of claims based on the provisions of the Treaty of 1886, must be referred to arbitration as provided for by the Protocol of 1886.

" This Protocol creates for the Parties concerned, in the event of differences between them, an obligation to nominate their arbitrators for the purpose of setting up a Commission of Arbitration as provided for by the Protocol of 1886. This is a case of compulsory arbitration.

" If the United Kingdom had nominated an Arbitrator, as requested by the Hellenic Government, it would be for the Commission of Arbitration to decide as to the validity of the Ambatielos claim. And this Commission would be unable to consider the Ambatielos claim as valid unless, in fact, it were based on the Treaty of 1886.

" But, in questions of arbitration, it is at the present time well recognized that if one of the parties should, for any reason, consider that the arbitral tribunal lacks jurisdiction to deal with the dispute, the question whether it in fact has jurisdiction is one that cannot be decided, as an exercise of sovereignty, by the party raising the objection to the jurisdiction, but it must be decided by the arbitral tribunal itself. The tribunal which adjudicates on the case must also adjudicate on the objection. This is a point on which, at the present time, no one can have any doubt.

" If this principle is applied to the present case, it must follow that, if the United Kingdom Government had accepted recourse to arbitration as proposed by the Hellenic Government, it would have been for the Commission of Arbitration instituted under the Protocol of 1886 to decide whether the Ambatielos claim was, or was not, based on the provisions of the Treaty of 1886.

" In the light of these observations, the Court ought not to require that the Hellenic Government should establish that the Ambatielos claim ' is based on a provision of the Treaty of 1886 ', since the obligation of the United Kingdom to accept arbitration is independent of the question whether that claim is, in fact, based on the Treaty of 1886. This obligation would exist even if the claim were not, in fact, based on the Treaty in question. It is a different thing that—as has already been said—the Commission of Arbitration would only have been able to recognize the Ambatielos claim as valid to the extent that it was, in fact, based on the Treaty of 1886. And it was to secure a decision on the United Kingdom's obligation to accept arbitration that the Hellenic Government seised the Court (see the Hellenic Application and subsequent submissions).

" Moreover, since the Court is at present called upon to decide only the objection to the jurisdiction raised by the United Kingdom, it cannot, for procedural reasons, at the present time pass upon the validity of the Hellenic claim that it should hold that the United Kingdom is under an obligation to accept arbitration, a decision necessarily pertaining to the merits. From a procedural point of view the Court cannot give a decision upon the substance of the Greek claim until it has held that it has jurisdiction to do so.

" Since, however, in my opinion, the Court is not called on to enquire whether the Ambatielos claim ' is based on the provisions of the Treaty of 1886 ', it may be asked whether, in deciding on the merits of this Hellenic claim (that is to say, on the question whether the United Kingdom is under an obligation to accept arbitration), the Court should confine itself, after hearing the Parties, to referring them to the arbitration provided for by the Protocol of 1886, without being able to consider any other matter.

" In answering this question it is necessary to bear in mind that, when a State has bound itself by a compulsory arbitration clause—and the Protocol of 1886 is an example of such a provision—that State cannot, in principle, have any ground for refusing an offer of recourse to arbitration. It is only in quite exceptional cases, where the invitation to resort to arbitration is manifestly an abuse on the part of the State requesting it, that recourse to arbitration is not compulsory. An example of such abuse would be a case in which one of the parties demanded the setting-up of the arbitral tribunal where no real dispute existed. In such a case it is indeed necessary to admit the other party's right to refuse to nominate its arbitrator. Such an allegation, if made, could of course be considered by the Court, when deciding upon the validity of the claim of the Hellenic Government in this case . . . "

In his Dissenting Opinion the President, Sir Arnold McNair, said:

" . . . The question before the Court is whether or not the Court has jurisdiction to deal with a certain claim made upon the United Kingdom by the Hellenic Government on behalf of one of its nationals, M. Ambatielos. The United Kingdom Government has accepted the compulsory jurisdiction of this Court by making the Declaration specified in Article 36 of the Court's Statute, but the Hellenic Government has not done so, with the result that the Court is not invested with compulsory jurisdiction under this Article. The Hellenic Government, however, claims that Article 29 of the Anglo-Greek Commercial Treaty of 1926, coupled with Article 37 of the Statute of the Court which substituted this Court for the Permanent Court of International Justice, confers compulsory jurisdiction in this case,

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" Article 29 of the Treaty above mentioned is as follows:

' The two Contracting Parties agree in principle that any dispute that may arise between them as to the proper interpretation or application of any of the provisions of the present Treaty shall, at the request of either Party, be referred to arbitration.

' The Court of arbitration to which disputes shall be referred shall be the Permanent Court of International Justice at The Hague, unless in any particular case the two Contracting Parties agree otherwise.'

" The Treaty is accompanied by the following Declaration:

' It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886, and that any differences which may arise between our two Governments as to the validity of such claims shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of November 10, 1886, annexed to the said Treaty.'

" The claim is said to be based upon an Anglo-Greek Commercial Treaty of 1886 and thus to fall within the scope of this Declaration.

" Both in the British Treaty Series, 1927, and in the League of Nations Treaty Series, Vol. LXI, p. 16, the title is ' Treaty of Commerce and Navigation between the United Kingdom and Greece and accompanying Declaration signed at London, July 16, 1926.' The Treaty is followed by a Schedule and, below the Schedule, by the Declaration quoted above. The Schedule is specifically incorporated in the Treaty by Article 8 of the Treaty which contains the following sentence:

' The articles enumerated in the schedule to this Treaty, produced or manufactured in Great Britain and Northern Ireland, shall not on importation into Greece be subjected to higher duties than those specified in the schedule.'

There is no such specific incorporation of the Declaration in the Treaty.

" The Treaty ends as follows:

' In the event of doubt hereafter arising as to the proper interpretation of the English or Greek text, the English text shall be considered authoritative.

' In witness whereof the respective plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

' Done in duplicate at London in the English and Greek languages this 16th day of July 1926.

AUSTEN CHAMBERLAIN.
D. CACLAMANOS.
A. VOUIROS.'

" The accompanying Declaration ends as follows:

' Done at London the 16th July, 1926.

AUSTEN CHAMBERLAIN.
D. CACLAMANOS.
A. VOUIROS.'

The Schedule, for obvious reasons, contains no date and no signatures.

" Three questions arise in regard to ratification.

" (a) Article 32 of the Treaty of 1926 provides that ' The present Treaty shall be ratified. . . . ' There is no corresponding provision in the accompanying Declaration. In fact, what appears to have

happened is that a printed text of the Treaty, Schedule and accompanying Declaration was sandwiched into the middle of the traditional standard printed form of the United Kingdom Instrument of Ratification (for a copy see Satow, *Guide to Diplomatic Practice*, 3rd ed. pp. 408, 409), that is to say, between the formal introductory part and the formal concluding part, and then the Instrument was tied up with ribbon, dated, sealed, and exchanged for the Greek Instrument of Ratification.

" There has been some controversy on the question whether or not the Declaration was also ratified by the United Kingdom, though, according to the practice of the United Kingdom, the Declaration did not require ratification, and the United Kingdom Government does not contend that the Declaration is not binding upon it. It appears that owing to the destruction of the Greek archives during the recent war, the United Kingdom Instrument of Ratification could not be found in Athens. The explanation given to the Court by the United Kingdom Agent is as follows:

' I have, however, found in the Foreign Office records a copy of the United Kingdom's instrument of ratification, which was printed, and from this it appears that the United Kingdom did not ratify the Declaration. A certified photostat copy of this document is enclosed herewith. It is true that the Declaration is printed on the back of the copy of the Treaty contained in the ratification, but this is only because the printed edition of the Treaty prepared for signature (which had the Declaration printed on the back) was also used, as is customary, for the instrument of ratification, and it should not be inferred that the ratification was intended to cover the Declaration as well as the Treaty.'

" Nevertheless, I consider that the fact that the United Kingdom Government handed to the Hellenic Government, by way of exchange, an Instrument of Ratification duly sealed and embodying the text of the Treaty, the Schedule and the accompanying Declaration, makes it necessary to hold that the Declaration was ratified at the same time, and by the same instrument, as the Treaty with its Schedule.

" (b) There arises a different question, namely, whether a global ratification has the effect of making all the documents comprised in it parts of the Treaty which was the main subject-matter of the ratification, unless they would be so incorporated by virtue of the intention of the Parties, express or implied. My answer to this question is in the negative. The question whether documents accompanying a Treaty—by whatever name they may be called, Declarations, Protocols, Additional Articles, Exchanges of Letters, etc.—are incorporated in the Treaty or not, depends upon the intention of the contracting Parties. The intention to incorporate such a document in a Treaty is frequently evidenced expressly by a written stipulation to the effect that it shall form an integral part of the Treaty; or, alternatively, it may be implied from the juridical nature of the document and its relation to the Treaty. Of an express stipulation there are countless illustrations, old and recent; for instance, in the Jay Treaty of 1794 between the United States of America and Great Britain (Miller, *Treaties of the United States of America*, Vol. 2, p. 272), where President Washington did ' hereby declare that the said Treaty, and the said Additional Article form together one Instrument and are a Treaty between the United States of America and His Britannic Majesty ' ; or the Greco-Italian Commercial Convention of November 24, 1926 (League of Nations Treaty Series, Vol. 63, No. 1480), where one of the two accompanying Declarations is expressed to be an integral part of the Treaty, while

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the other (which, incidentally, bears some resemblance to the Declaration of 1926 now under consideration) contains no such term; or, again, Article 92 of the Charter of the United Nations, which states that the 'annexed Statute' of this Court 'forms an integral part of the present Charter'. (Notice, incidentally, 'the present Charter', not 'the Charter of the United Nations signed at San Francisco the 26th day of June, 1945'.) I shall deal later with the question whether the incorporation of the Declaration in the Treaty of 1926 can be implied.

"(c) It is also suggested that it must be inferred from the expression 'which treaty is, word for word, as follows', occurring in the United Kingdom's Instrument of Ratification, that all the documents (Treaty, Schedule and Declaration) which follow these words must be regarded as forming one Treaty. If the history of this phrase is examined, I do not consider that it can sustain this argument. Either in this form or in some such phrase as 'duquel la teneur de mot à mot s'ensuit', in Latin, French, English or German, this traditional formula has been in use in Treaties and other public documents for at least 600 years. (See, for instance, Dumond, *Corps universel diplomatique du Droit des Gens et Recueil des Traités*, Vol. 2, pp. 22-26, where the formula occurs in two Acts of Cession and Renunciation between the King of France and the King of England dated 1360, 'de quelles Lettres la teneur de mot à mot s'ensuit', or 'de mot en mot', and many similar illustrations throughout the volumes of Dumont; see also a Russian Instrument of Ratification of 1739 in Mervyn Jones, *Full Powers and Ratification*, p. 167, 'desquels la teneur suit, transcrit de mot à mot'; and President Washington's ratification of the Jay Treaty of 1794, 'which Treaty is word for word as follows; to wit', in U.S. Senate Document No. 26 of 1919, 'Ratification of Treaties, Methods and Procedure, etc.', p. 49.) The formal parts of Treaties, and the documents connected with the making of Treaties, such as Full Powers, Instruments of Ratification, Procès-verbaux of Exchange of Ratifications, etc., contain many expressions of an archaic and purely routine character, and I do not find it possible to infer from the expression 'which Treaty is, word for word, as follows' the intention of the Contracting Parties to incorporate all the documents which follow into the Treaty; that is, I do not think that Article 36 (1) of the Statute of this Court envisages as one of the bases of its jurisdiction so slender a consensual foundation as is afforded by the use of one of these venerable and routine formulas. The corresponding expression in the Greek Instrument of Ratification is 'the texts of which follow'.

"Too much importance must not be attached to consistency in language, but it must be noted that Articles 8, 14, 19, 21, 25, 29, 30 and 32 of the Treaty of 1926, when referring to that Treaty, use the expression 'the present Treaty' or 'this Treaty', whereas the accompanying Declaration refers to it as 'the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date', just as later on it refers to the Anglo-Greek Commercial Treaty of 1886. This language suggests to my mind that the signatories of the Declaration did not regard it as a part of the Treaty of 1926. If they had done so, they would have found it shorter, more natural and more consistent with the language of that Treaty itself to use the expression 'the present Treaty' or 'this Treaty'; moreover, it is unlikely that they would have lapsed into the first person and used the expression 'our two Governments', which is more appropriate to an exchange of assurances by Ministers on behalf of their respective Governments than to a treaty.

"I shall now turn from questions of form and language to examine the juridical nature of the Declaration and its relation to the Treaty.

" The genesis of the Declaration must be noted. It is not necessary for the Court, nor open to it at this stage, to construe the Declaration for the purpose of forming an opinion on the question whether or not the Ambatielos claim falls within it. It is, however, both permissible and necessary to examine the question why, and how, the Declaration came into being. It must be remembered that, until a date in 1926 about to be mentioned, the commercial relations between Greece and the United Kingdom were governed by the Anglo-Greek Commercial Treaty of 1886. This Treaty was denounced by the Hellenic Government in 1919, no doubt with the intention that it should be replaced by a treaty more appropriate to modern conditions. The operation of the denunciation was suspended from time to time, and it did not actually take effect until July 28, 1926. Attached to the ' Observations and Submissions of the Hellenic Government on the Objection to the Jurisdiction ' is the following letter from Mr. Miles Lampson (as he then was) of the United Kingdom Foreign Office:

' Foreign Office.
22nd June, 1926.

' The Greek Minister.
' Sir,

' Before proceeding to the signature of the commercial treaty between Greece and this country, I would ask for an assurance that the conclusion of the treaty will not be regarded by your Government as prejudicing the claims of British subjects for compensation or relief on the ground that the recent Greek loan is contrary to Article 13 of the Anglo-Greek Commercial Treaty of 1886, and for a further assurance that in the event of any difference of opinion between our two Governments with reference to the validity of these claims, the matter shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of November 10, 1886, annexed to the said Treaty.

M. LAMPSON,
For the Secretary of State.'

" Upon receipt of this letter, the Hellenic Government, in order to generalize the reference to claims arising under the Treaty of 1886 and to make the proposed assurance reciprocal, submitted a draft Declaration, the terms of which are to be found in paragraph 13 of the Counter-Memorial of the United Kingdom dated February 4, 1952. The United Kingdom Government, in reply, proposed the form of Declaration which was in fact adopted. The Declaration is evidently an elliptical document and seems to be due to the desire of both Parties that the expiry of the Treaty of 1886, then imminent, should not adversely affect claims ' based ' upon it, and the procedure of arbitration provided therein for them. I do not see how the provisions of the Treaty of 1926 could prejudice claims ' based ' on the Treaty of 1886 because, in my opinion, such claims acquire an existence independent of the treaty whose breach gave rise to them. Neither the expiry of the Treaty of 1886, nor the entry into force of the Treaty of 1926, could affect the survival and validity of claims ' based ' on a breach of the Treaty of 1886 which had already occurred. In other words, I consider that the first sentence of the Declaration was, however prudent, strictly speaking unnecessary and was inserted *ex abundanti cautela*. On the other hand, the second sentence of the Declaration, that is, the sentence dealing with the arbitral procedure, was necessary to preserve that procedure, because it would otherwise lapse upon the expiry of the Treaty of 1886.

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What made the first sentence of the Declaration prudent, and the second sentence of the Declaration necessary, was not the Treaty of 1926 but the imminent expiry of the Treaty of 1886, which took effect on July 28, 1926, by reason of its denunciation by the Hellenic Government. The Declaration does not touch or concern anything contained in the Treaty of 1926 but regulates something external and collateral to it.

"There are two other factors which support the conclusion that the Declaration is not part of the Treaty of 1926: first, the difference between the Treaty and the Declaration as to the respective periods of their duration, and, secondly, the difference in their respective provisions for the settlement of disputes. The effect of Article 32 of the Treaty of 1926 is that the Treaty was intended to last for at least three years from the date of its coming into force and thereafter would remain in force until the expiration of one year's notice given by either Party to the other. Thus it was capable of expiring at the end of three years from the date of its coming into force. On the other hand, no date is fixed for the expiry of the duration of the Declaration, and it would have been highly inconvenient and contrary to the intentions of the Parties that the arbitral procedure expressly maintained by the Declaration should fall to the ground at the same moment as the Treaty of 1926. This was an additional reason for making the Declaration a separate document and not making it a provision of the Treaty.

"Moreover, it is necessary to note that the Declaration contains its own machinery for the settlement of disputes between the two Governments as to the validity of claims arising under the Treaty of 1886, namely, the arbitral procedure provided by the Protocol of November 10, 1886, annexed to that Treaty. The fact that the Parties maintained this special machinery for dealing with these claims makes it difficult to believe that the general machinery of Article 29 of the Treaty of 1926 was intended to apply to any dispute concerning such a claim.

"The conclusion that I reach is that the Declaration is precisely what it is said to be in the League of Nations Treaty Series, Vol. LXI, p. 16, namely, an 'accompanying Declaration', and that it is not among the 'provisions of the present Treaty' within the meaning of Article 29. It is a collateral and contemporaneous agreement between the Parties, entered into because one of them, at any rate, was not prepared to sign the new Treaty, and to contemplate the expiry of the old Treaty of 1886 on July 28th, 1926, without having previously made sure that claims based on the old Treaty would survive these events and, what is more important, that the arbitral procedure provided in the old Treaty for dealing with these claims should also survive with them. But even if the provisions of the Declaration are among the provisions of the Treaty of 1926, in my opinion the existence of the special machinery for dealing with disputes contained in the Declaration excludes the application of the general provisions of Article 29 of that Treaty.

"For these reasons, the Court has, in my opinion, no jurisdiction at all in this case."

In his Dissenting Opinion Judge Basdevant said:

"... The United Kingdom filed an objection to the jurisdiction in answer to the Application submitted by the Hellenic Government in April 9, 1951. This objection to the jurisdiction was expressed in brief terms, but in terms having a very wide scope, by the United Kingdom Agent at the hearing in Court on May 17, 1952. The course

of the arguments made it clear that this objection to the jurisdiction met a twofold claim by the Hellenic Government. The latter Government asked the Court, in the first place, to deal with the merits of a claim by that Government regarding the treatment of M. Ambatielos by the British authorities and, secondly, to decide as to the obligation to refer this claim to the arbitration provided for by the Protocol of November 10, 1886.

"It is in this order that the validity of the Preliminary Objection raised by the United Kingdom should be considered. If the Court should find that it has jurisdiction to deal itself with the Ambatielos claim and if it accordingly retains this claim for its consideration, the request for a declaration that the claim must be referred to the arbitration provided for in the Protocol of 1886 becomes devoid of object and therefore the challenge to the jurisdiction to which it gave rise need not be further considered.

"In accordance with the principle laid down by the Court in other cases (I.C.J. Reports 1949, pp. 177-178, and 1950, p. 71), which is not disputed in the present case, the jurisdiction of the Court depends upon the consent of the States parties to the dispute. Therefore, since no special agreement has been concluded, we are here concerned with Article 29 of the Treaty of July 16, 1926, between Greece and the United Kingdom, the only text relied upon as conferring jurisdiction upon the Permanent Court of International Justice so far as these two States are concerned; such a conferring of jurisdiction has now been extended to the International Court of Justice by the operation of Article 37 of the Statute of the Court.

"Article 29 of the Treaty of 1926 confers upon the Court jurisdiction to decide any disputes that may arise between the contracting parties 'as to the proper interpretation or application of any of the provisions of the present Treaty'. The facts which the Hellenic Government submits for the Court's decision as to their conformity, or otherwise, with the United Kingdom's international obligations, occurred before the conclusion of the Treaty of 1926. The complaints which the Hellenic Government seeks to base upon these facts cannot be judged upon the basis of obligations flowing from the Treaty of 1926. These complaints are therefore outside the sphere of applicability of Article 29: this Article provides no ground entitling the Court to deal with them.

"The fact that the Treaty of 1926 is said to contain provisions more or less similar to those of the Treaty of 1886 cannot make the provisions of the Treaty of 1926 applicable to facts which occurred before the coming into force of this Treaty, and thus extend to such facts the effect of Article 29, the only provision conferring jurisdiction on the Court.

"The Declaration which follows the Treaty of 1926 shows the correctness of this conclusion. That Declaration refers to differences as to the validity of claims based on the Treaty of 1886. The Hellenic Government contends that the Ambatielos claim is one of the claims referred to in the Declaration of 1926; there is no need to decide as to the correctness of this contention, for it is sufficient to observe that the Declaration provides, for the settlement of differences relating to such claims, the arbitral procedure created by the Protocol of 1886; it does not substitute judicial proceedings before the Court for this procedure. Furthermore, the Greek Legation in London stated in a note of August 6, 1940: 'The Arbitral Committee provided for by the final Protocol of the Greco-British Commercial Treaty of 1886 is the only competent authority in the matter.'

"The Court therefore has no jurisdiction to deal with the merits of

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the Ambatielos claim as formulated in paragraph 1 of the Conclusions presented on behalf of the Hellenic Government at the hearing of May 17.

" Having no jurisdiction to deal with the Greek claim relating to the treatment of Ambatielos, the Court is confronted by another aspect of the dispute. The Hellenic Government asked that the Ambatielos case should be referred to the arbitral procedure established by the Protocol of 1886; the United Kingdom Government refused. The Hellenic Government then asked the Court to say that this arbitral procedure should be applied in this case. This second dispute, which thus relates to the existence in this case of an obligation to have recourse to the arbitral procedure of the Protocol of 1886, has been described in different terms in the course of the proceedings, and the jurisdiction of the Court to deal with it is disputed by the United Kingdom. The Court must therefore decide whether it has jurisdiction to deal with this point.

" In the Conclusions submitted in its Counter-Memorial, the United Kingdom has employed an abstract form for the statement of its objection to the jurisdiction. The Court cannot deal with a submission so formulated. It has before it a concrete claim that it should state whether the United Kingdom is under an obligation to accept the submission to arbitration of the Hellenic claim relating to the Ambatielos case. The Court has to determine whether it is competent to adjudicate upon the existence of such an obligation in the present case.

" The obligation which the Hellenic Government asks the Court to find in this case derives from the Protocol of 1886, which provides for the submission to a Commission of Arbitration, constituted by the two Governments, in each case, for this purpose, of disputes arising between them respecting the interpretation or the execution of the Treaty of 1886, or the consequences of any violation thereof. The Hellenic Government requested that its claim in the Ambatielos case should be submitted to arbitration; the United Kingdom Government refused, and the arbitration clause of the Protocol of 1886 therefore did not take effect.

" There was thus an example of the gap existing in the machinery of an arbitration clause which, as is frequently the case, can only become effective as the result of the joint action of the two States in conflict: in this case such joint action was necessary for the constitution of the Commission of Arbitration. Where one of the States adopts the view that the case is not one calling for arbitration, the operation of the arbitration clause becomes impossible. This gap, which exists also in respect of other Treaty provisions, has manifested itself in other cases besides the present one. Attempts have at times been made to fill this gap. One such attempt was made in Article 53 of The Hague Convention I of October 18, 1907, a provision which has however been made inoperative, so far as they were concerned, by a number of States, including Greece, by means of a reservation.

" The Protocol of 1886 left the gap unfilled. It does not itself provide any remedy for this defect. The Hellenic Government contends that a remedy is provided by Article 29 of the Treaty of 1926, and the Declaration following this Treaty, on the ground that the Court, by virtue of these texts, has jurisdiction to decide whether the Ambatielos claim should be submitted to arbitration in application of the Protocol of 1886. According to this argument, Article 29 and the Declaration of 1926 impliedly added to the undertaking to arbitrate given in 1886 a further clause conferring jurisdiction on the Court to adjudicate upon disputes arising with regard to the interpretation or the application of the arbitration clause in the Protocol of 1886.

" The Declaration of 1926 provides that any differences which may arise between the two Governments as to the validity of claims on behalf of private persons based on the provisions of the Treaty of 1886 ' shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of November 10, 1886 '. Article 29 of the Treaty of 1926 confers jurisdiction on the Court to deal with disputes as to the interpretation or application ' of any of the provisions of the present Treaty '. It was contended, on behalf of the Hellenic Government, that the Declaration of 1926 was an integral part of the Treaty of the same date, that what was therein provided was to be regarded as a provision of that Treaty, that, consequently, a dispute as to the interpretation or application of the Declaration was within the jurisdictional clause contained in Article 29 and that thus a way was opened for the admission of the Court's jurisdiction to decide as to the interpretation or application of the arbitration clause contained in the Protocol of 1886 and referred to in the Declaration of 1926.

" Underlying this argument is the idea that the Declaration is an integral part of the Treaty of 1926, that it is a provision of this Treaty. If this proposition be not accepted, the whole argument founded upon it falls to the ground, for the Declaration makes no reference to the Court and does not directly confer any jurisdiction upon it.

" In order to determine whether the Declaration is or is not part of the Treaty, the Parties presented lengthy arguments concerning the external features of the Declaration in relation to the Treaty of 1926, the references that have been made to both of them, and the place attributed to them in the documents connected with them. For a proper appreciation of the significance which ought to be attributed to any factor of this nature a preliminary observation is called for.

" The drafting and the signature of an international agreement are the acts by means of which the will of the contracting States is expressed; ratification is the act by which the will so expressed is confirmed by the competent authority, for the purpose of giving it binding force. All these acts are concerned with the substance itself of an international agreement. But the recording of these acts in the instruments which are designed to give them material existence involves the physical operations of writing, printing, transmission by one party to the other, etc., operations which do not contribute to the formation of the will of the contracting States; those who have the task of forming, expressing or confirming this will, do not, as a rule, take part in these physical operations; these operations commonly take a form deriving from tradition, which is followed scrupulously, and therefore blindly, by the officials entrusted with this material task. It would be wrong to attribute to the details of form thus superimposed upon the juridical act of the conclusion of a Treaty any determining influence, when it becomes necessary, in case of doubt, to ascertain the true meaning of the agreement which has been reached, the character which the parties intended to give to any given agreement concluded between them.

" The scope to be given to a particular expression employed, or to a particular form which has been followed, should be considered in the light of these remarks when it is sought to determine whether the Declaration of 1926 is to be regarded as constituting a provision of the Treaty of the same date.

" In this connection, it is of particular significance that it was the very persons who were responsible for expressing the will of the States who chose to use, in Article 29, the expression ' provisions of the present Treaty ', and not a more comprehensive expression. It was they

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who chose to give their agreement concerning claims based on the Treaty of 1886 the form of a separate provision, and not of an article in the Treaty of the same date; it was they who gave it the title of Declaration and not that of an additional article, who saw fit to append their signatures to it, separately from the Treaty, and to make no reference to it in the Treaty, in contra-distinction to what they did in the case of the Schedule which precedes it. All this, for the reasons indicated above, is of greater importance in determining the character of the Declaration than the fact that the Declaration was printed after the Treaty and the Schedule, in one document with consecutive pagination, physical details which, like others of the same kind, are governed by the actions of officials who, unlike plenipotentiaries, were not responsible for elaborating and stating the will of the contracting Parties.

" Similarly, when they signed the instruments of ratification—act by which they confirmed the agreement reached by their respective Plenipotentiaries and by which they gave the Declaration a definitive character of the will of the contracting States—the President of the Greek Republic and the British Monarch were merely confirming what had already been declared by their Plenipotentiaries. They did not direct their minds to details, often superfluous or incorrect, which officials, unqualified to interpret, complete or correct the intentions of their Sovereigns, borrowed from forms which they traditionally and blindly followed.

" An examination of the various factors relied upon on either side—if undertaken with care to attribute importance only to those considerations which throw light on the intentions of those who alone were qualified to declare the will of their respective Governments and not to considerations which do not relate to the formation of this will—should lead to the view that the Declaration is distinct from the Treaty, and not a clause or provision of the Treaty itself; such an examination should also lead to the reading of Article 29 as it is written—that is to say, as giving the Court jurisdiction in respect of disputes as to the interpretation or application of the ' provisions of the present Treaty '—and not to the substitution, for these perfectly clear words, by means of interpretation, of the words ' provisions upon which agreement was reached by the Parties to-day ', or some such words of lesser precision.

" This independent character of the Declaration also clearly appears if, putting aside particularities of form and details of presentation, one has regard to the substance of the matter, with a view to considering whether the Declaration, in spite of its separate presentation, does not constitute a sort of supplementary provision of the Treaty, which it would have been proper to describe as an additional article: that was the method adopted by Max Huber in his Report on the British claims against Spain, when he had to decide as to the independent character of an agreement which he was called upon to interpret (*Reports of International Arbitral Awards*, II, pp. 632-633).

" The Declaration does not explain any clause of the Treaty. Nor does it explain its general effect, which has been said to be the abrogation of the Treaty of 1886 by the Treaty of 1926. In fact, not only did the Treaty of 1926 contain no provision abrogating the Treaty of 1886, but it did not effect any tacit abrogation of the Treaty of 1886. The Treaty of 1886 did not cease to be in force as the result of any express or implied abrogation by the Treaty of 1926, but as a result of its denunciation by the Hellenic Government on March 3, 1919. The date upon which this denunciation was to take effect was the subject of a number of postponements, and it was finally fixed as at the date of the

coming into force of the new Treaty. The coming into force of the Treaty of 1926 thus provided a date adopted by both Parties on which the earlier denunciation would have legal effect; it is not itself the juridical source of the extinguishment of the Treaty of 1886: this extinguishment resulted from the denunciation of the Treaty.

"Consequently the Declaration of 1926, considered from the point of view of its content, is not an instrument which explains the Treaty of 1926, but an agreement relating to one of the effects of the lapsing of the Treaty of 1886, this lapsing being itself the result of the denunciation of this Treaty. From the point of view of its substance, even more clearly than from the point of view of its form, the Declaration must be regarded as separate from the Treaty. It cannot be regarded as, or even assimilated to, a provision of the Treaty. It follows that the jurisdictional clause of Article 29 of the Treaty is not applicable to it.

"The Declaration of 1926 was designed to preserve, in respect of the claims therein referred to, the earlier régime resulting, so far as the merits were concerned, from the Treaty of 1886, and, so far as the procedure for the settlement of disputes was concerned, from the Protocol of 1886, to which it specifically refers. The earlier régime was preserved as it stood, with its advantages and disadvantages. Its disadvantages (the possibility of frustration of the arbitration procedure) only became apparent later. There is nothing to suggest that in 1926 there was any thought of remedying this defect with regard to claims arising falling within the Treaty of 1886. If this had been thought of, the system adopted would not have been to entrust to the Court the settlement of a dispute which might arise as to whether, in any given case, there was an obligation to resort to arbitration, while at the same time preserving the arbitral procedure before a Commission of Arbitration appointed *ad hoc* to deal with the principal dispute, that relating to the validity of the claim; rather would there have been a complete substitution of the Court's jurisdiction for the arbitral procedure provided for in 1886. This was not the course adopted. It is impossible to attribute to the framers of the Declaration an intention which they never expressed, namely to create a system of such complexity, and one which, at the present time, neither of the Parties would wish to be applied.

"It is therefore necessary to recognize that the Declaration leaves the claims which a party seeks to base upon the Treaty of 1886 legally in the same position as they occupied formerly. It leaves unaffected the gap in the operation of the arbitration clause of the Protocol of 1886. If we have regard to the stage of development of international law at that period, and to the fact that in 1926 neither of the two States had subscribed to the Declaration relating to the compulsory jurisdiction of the Court, there is nothing surprising about this. The Court therefore has no jurisdiction to deal with a dispute concerning the existence, in a given case, of an obligation to resort to arbitration pursuant to the Protocol of 1886. In other words, Article 29 of the Treaty of 1926 does not appear to me to be applicable to such a dispute.

"Furthermore, if it be accepted that the Declaration is a provision of the Treaty of 1926, that would mean that the Court has jurisdiction to deal with a dispute concerning the interpretation and application of the Declaration: that would authorize the Court, in the present case, to adjudicate upon the British contention that it is entitled to refuse to the Ambatielos claim the benefits of the Declaration, on the ground that it was not presented prior to the Declaration.

"But a decision on this point is not sufficient to resolve the question whether there exists any obligation to refer the Ambatielos claim to arbitration. Such an obligation, if it exists, arises from the Treaty and

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the Protocol of 1886: the dispute as to the existence, in this case, of such an obligation is a dispute concerning the interpretation and application of that Treaty and that Protocol. But Article 29 did not confer on the Court jurisdiction to deal with a dispute which, in the way now contemplated, relates exclusively to the interpretation and the application of the Treaty and Protocol of 1886: it has never been contended—and it is manifestly impossible to say—that the provisions of that Treaty and Protocol are provisions of the Treaty of 1926.

"In conclusion, the Court ought in this case simply to observe that the Declaration of 1926 left the Parties with the régime created by the Treaty and the Protocol of 1886, a régime which remained completely unchanged by the Declaration, and that it is therefore for the Parties to take such action as they deem proper in pursuance of the provisions of the Treaty of 1886, and that the Court has not been invested by the Parties with any power to substitute itself for them in determining the action which ought to be taken in pursuance of those provisions in the present case.

"The foregoing considerations lead me to the conclusion that the Court has not been given jurisdiction either to deal with the merits of the claim presented by the Hellenic Government in the *Ambatielos* case, or to consider and decide whether there is an obligation binding the States at issue to submit this claim to the arbitration provided for by the Protocol of 1886."

In his Dissenting Opinion Judge Zoričić said:

"The Court has found that it has jurisdiction to decide whether the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the *Ambatielos* claim, in so far as this claim is based on the Treaty of 1886. I regret that I am unable to concur in this decision for the following reasons:

I

"It is common ground between the Parties that Article 29 of the Treaty of 1926 is the only contractual clause between them which, in conjunction with Article 37 of the Court's Statute, confers compulsory jurisdiction on the Court. Article 29, paragraph 1, is worded as follows:

'The two Contracting Parties agree in principle that any dispute that may arise between them as to the proper interpretation or application of any of the provisions of the present Treaty shall, at the request of either Party, be referred to arbitration.'

"Paragraph 2 of the same Article lays down that the court of arbitration shall be the Permanent Court of International Justice, and therefore, in the present circumstances, the International Court of Justice.

"On the other hand, the Declaration of July 16, 1926, lays down that:

'... the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886, and that any differences which may arise between our two Governments as to the validity of such claims shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of November 10, 1886, annexed to the said Treaty.'

" The Protocol of November 10, 1886, provides for the settlement of controversies by commissions of arbitration, the members of which have to be selected by the two Governments, by common consent, etc.

" It was not disputed by the Parties that the Ambatielos claim was put forward by the Hellenic Government on the basis of the Declaration. They disagree upon the question whether the Declaration can, or cannot, be regarded as a provision of the Treaty of 1926, within the meaning of Article 29 of that Treaty, conferring jurisdiction on the Court.

" The question whether a separate provision adopted by the parties on the occasion of the conclusion of a Treaty should or should not be considered as an integral part of the Treaty in question, depends—in the absence of any rule on that point—entirely on the circumstances of each individual case. These circumstances may include certain formal elements, but what is of chief importance is the content of the provision in question.

" In the case now before the Court, it has been argued that the plenipotentiaries inserted the Treaty, the Customs Schedule, which is indisputably a part of the Treaty, and the Declaration, in a document of forty-four pages, the Declaration appearing on p. 44. Furthermore, great importance has been attached to the fact that the ratification of the Declaration was effected by the two States, at the same time as the ratification of the Treaty, and that, above all, the United Kingdom document of ratification does not mention the Declaration separately, but conjointly with the Treaty, and under the designation ' Treaty '.

" In my opinion all these considerations are of secondary importance, and it can be argued in the opposite sense that the Declaration was drawn up and signed as a separate instrument from the Treaty, having a title of its own, and that neither the Treaty nor the Declaration mentions the latter as being part of the Treaty, although the Parties were careful, in Article 8 of the Treaty, to make express mention of the Customs Schedule which precedes the Declaration. In regard to ratifications, the Hellenic ratification mentions the Treaty and the Declaration separately, while the United Kingdom's instrument of ratification, worded in the terms of a formula, doubtless of long standing, certainly refers to the Treaty: ' which is word for word as follows ', but nevertheless includes the Declaration under its own title. It follows, in my opinion, that the two Governments undoubtedly considered the Treaty and the Declaration as forming part of a simultaneous agreement, and as having to be ratified together, but that in no way proves that the Declaration was ' a provision ' of the Treaty of 1926 within the meaning, and for the purposes, of Article 29 of that Treaty; still less does it follow that the Parties intended to submit disputes in regard to the application of that Declaration to the arbitration provided for in Article 29. Again, the Declaration was drawn up subsequently to, and independently of, the Treaty, a point on which I shall have more to say later on.

" In these circumstances, the point of real importance is what are the terms of the text that has to be construed, and what were the intentions of the Parties and the purposes which the text was to serve, for: ' . . . the Court's aim is always to ascertain whether an intention on the part of the parties exists to confer jurisdiction upon it ' (P.C.I.J., Series A, No. 8, p. 32).

" In order to understand the aim of the Declaration and the intention of the Parties, it is necessary to recall the situation which gave rise to this Declaration. Greece and the United Kingdom had, in 1886, concluded a Treaty of commerce and navigation, to which was attached a protocol providing that any controversies which might arise respecting

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the interpretation or the execution of the Treaty should be submitted to the decision of commissions of arbitration. The Treaty of 1886 was denounced by Greece in 1919, and was afterwards renewed, for successive periods, the last time by an exchange of notes, until August 31, 1926, it being, however, understood that it would cease to be in force on the date of the coming into force of the new Treaty, which was in course of preparation. Before the signature of the new Treaty the United Kingdom Government had realized that, owing to the termination of the Treaty of 1886, certain claims of its nationals, based upon that Treaty, could no longer be referred to the arbitration provided in the Protocol of 1886, and in order to safeguard these rights—that is, rights founded on the Treaty of 1886—the United Kingdom Government approached the Hellenic Government (see letter of June 22, 1926, from the Foreign Office to the Greek Minister, annexed to the Greek Observations) seeking for assurances on this point before the signature of the new Treaty, which had, it is clear, been already drafted. The two Governments then agreed on the Declaration, which was signed on the same day as the Treaty of July 16, 1926. It is the interpretation and application of this Declaration which have given rise to the present dispute.

“ In these circumstances, I do not consider that any support for the theory that the Declaration was an interpretation of the Treaty of 1926, or a reservation to that Treaty, is to be found, either in the terms of the Treaty, or in the purposes which the Declaration was to serve, or in the terms of the Declaration. A reservation is a provision agreed upon between the parties to a Treaty with a view to restricting the application of one or more of its clauses or to clarifying their meaning; it is therefore, by its very nature, closely linked to the content of the Treaty. But in the present case, the Treaty makes no mention of the Declaration; and the Declaration, for its part, does not explain anything; it neither adds anything to, nor subtracts anything from, the provisions of the Treaty of 1926; all that it says is that ‘ the Treaty of to-day’s date does not prejudice claims . . . based on the . . . Treaty of 1886 ’. Leaving on one side the indisputable fact that the Treaty of 1926 could not, in the absence of any special provision to that effect, in any way prejudice rights acquired under the régime of an earlier Treaty, and that, in consequence, the words ‘ the Treaty . . . of to-day’s date ’ could not have reference to the content of the Treaty of 1926, the only true interpretation of these terms seems to be that it was intended simply to fix the date of the expiry of the Treaty of 1886; this event was in no way a consequence of any clause in the Treaty of 1926, or of that Treaty as a whole, but was a consequence of the denunciation by Greece of the Treaty of 1886 which—as has been mentioned—was to be brought to an end, by means of a special agreement contained in an exchange of notes, on the date of the coming into force of the new Treaty.

“ If that is the case, and I feel no doubt upon the subject, it seems impossible to hold that the Declaration can be regarded as an interpretative clause or as a reservation to the Treaty of 1926, which does not contain any clause repealing the Treaty of 1886. Article 32 of the Treaty of 1926 does not even mention the Treaty of 1886; it merely provides that the Treaty of 1926 will come into force immediately after the ratification, that is, at an uncertain date. As it had been agreed upon, in the exchange of notes mentioned above, that this uncertain date should be the date of expiry of the Treaty of 1886, the only relation between the coming into force of the Treaty of 1926 and the termination of the Treaty of 1886 was a coincidence of dates resulting from a special agreement. Far from being a reservation to the Treaty of 1926,

the Declaration is, in my opinion, a reservation to the expiry of the Treaty of 1886, or, in other words, it is a partial prolongation of the Treaty of 1886 in so far as it maintains in existence claims based on the Treaty of 1886 and the means of arbitration provided for their settlement. The Declaration is, therefore, a special agreement governing a situation which is entirely extraneous to the Treaty of 1926, and it is not a provision of that Treaty within the meaning and for the purposes of Article 29 of the Treaty.

"That this is so is shown, in the first place, by the fact that, when drawing up the Treaty of 1926 and its Article 29, the Parties could not have had in mind any other provisions than those contained in the Treaty itself ('provisions of the present Treaty') and by the fact that the Declaration, prepared subsequently to the drafting of the Treaty and relating to a subject foreign to that Treaty, could not even have been contemplated at the time when the Treaty was drawn up. It follows that the Parties could not have had in mind the application of Article 29 to the subsequent Declaration.

"Secondly, the Declaration, which related solely to claims based on the Treaty of 1886, provided that 'such claims' should be dealt with by means of the arbitration prescribed in the Protocol of 1866, that is to say, by a special method of arbitration differing from that of Article 29. The Parties could quite well have inserted in the Declaration a reference to Article 29 of the Treaty of 1926, as was done in the entirely analogous Declaration annexed to the Greco-Italian Treaty of November 24 of the same year. They did not do so, and it must therefore be concluded that they deliberately maintained two methods of arbitration, that is to say, arbitration by the Court under Article 29 for disputes arising under the Treaty of 1926, and the arbitration provided for in the Protocol of 1866 for disputes arising in connection with claims based on the Treaty of 1886.

"That this was so and that the Hellenic Government itself considered that the arbitration system of 1886 was the only one applicable to the disputes mentioned in the Declaration, is clearly shown by the attitude which it observed throughout so many years subsequent to the ratification and which it expressed in particular in its note of August 6, 1940, addressed to the United Kingdom Government, wherein it stated:

'From the enclosed memorandum it clearly appears, in the opinion of the Royal Hellenic Government, that the arbitral committee provided for by the final protocol of the Greco-British Commercial Treaty of 1886 *is the only competent authority in the matter*, and it is their sincere hope that His Britannic Majesty's Government will see their way to inform them of the appointment of their arbitrator or arbitrators for a final settlement of this question.' (My italics.)

II

"To the foregoing considerations there should, in my opinion, be added another which is even more important, namely, that the Parties could not have intended to introduce in what has been called one and the same Treaty, a dual jurisdiction, that of Article 29 and that of the Declaration, for it is manifest that this must give rise to all kinds of complications.

"If the Declaration were to be regarded as a provision of the Treaty of 1926, within the meaning of Article 29, it would follow, according to the terms of the latter Article, that '*any dispute that may arise between the Parties as to the proper interpretation or application*'

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of the Declaration must be submitted to this Court as the court of arbitration referred to in Article 29.

"It would be impossible to draw a line of demarcation between the jurisdiction of the Court and that of the commissions of arbitration provided for in the Declaration, so that the Court would have jurisdiction only to decide whether the Parties were bound to have recourse to the arbitration system of 1886, while the commissions of arbitration would be competent to decide disputes concerning the validity of claims based on the Treaty of 1886. No foundation for such a division of jurisdiction can be found either in Article 29 or in the Declaration, for they both confer jurisdiction without any qualification. Either the Court has jurisdiction to interpret and apply the Declaration, or it has not. If it has jurisdiction, it cannot confine itself to exercising only a part of its jurisdiction and to stop at that point. On the contrary, the Court must decide, at the very least, whether the conditions of the Declaration have been satisfied—a point which pertains to the merits—that is to say, in particular, whether the claim was formulated and submitted in conformity with the Declaration, whether the Hellenic Government's claim is not barred as the result of the delay in its submission (a question which has, in fact, already been decided in the Judgment), whether the claim is based on the Treaty of 1886, and so on. Only if the Court were convinced that the conditions of the Declaration had really been fulfilled would it be possible for it to refer the case to the arbitral commission of arbitration provided for, as a special arbitration, for the sole purpose of determining the validity of the claim.

"But, according to the Declaration, it is not solely on the validity of the claims that the commissions of arbitration are to decide. On the contrary, any examination of the conditions of the applicability of the Declaration falls within the exclusive jurisdiction of the commissions of arbitration provided for in the Protocol of 1886. It is these commissions, and these alone, that are to decide 'on the validity of such claims'; they must, therefore, before undertaking an examination of the validity, satisfy themselves that these claims are really 'such' as are referred to in the Declaration. It follows that any action by the Court in relation to the Declaration and based on Article 29 of the Treaty of 1926 would inevitably lead to over-lapping and to a confusion between the Court's jurisdiction and that of the commissions of arbitration referred to in the Declaration, an extraordinary confusion which, I am convinced, the Parties certainly never intended to create.

"I have, therefore, reached the conclusion that, even if the Treaty and the Declaration are regarded as being part of one and the same agreement between Greece and the United Kingdom, the Declaration cannot be regarded as a provision of the Treaty of 1926, within the meaning and for the purposes of Article 29 of that Treaty, and that, in consequence, the Court is without jurisdiction in the present case."

In his Dissenting Opinion Judge Klaestad said:

"The Hellenic Government, which has not made any declaration under Article 36 (2) of the Court's Statute, contends that the jurisdiction of the Court can be derived from Article 29 of the Treaty of Commerce and Navigation of 1926 between Great Britain and Greece. The text of this Article is as follows:

'The two Contracting Parties agree in principle that any dispute that may arise between them as to the proper interpretation or application of any of the provisions of the present Treaty shall, at the request of either Party, be referred to arbitration.

'The Court of arbitration to which disputes shall be referred shall be the Permanent Court of International Justice at The Hague, unless in any particular case the two Contracting Parties agree otherwise.'

"The facts invoked by the Hellenic Government relate to the period from 1919 to 1923. Such facts can hardly involve an interpretation or application of provisions of a treaty which did not exist at the time when the acts complained of were done. One cannot commit a breach of non-existing treaty provisions, and it cannot make any difference if such provisions in a future treaty might become more or less similar to some of the provisions of the Anglo-Greek Commercial Treaty of 1886 actually existing at the time when the alleged breaches of those provisions were committed. The two Treaties were independent legal instruments, governed by different arbitration clauses.

"The Hellenic Government further contends that the jurisdiction of the Court can be derived from the Declaration attached to the Treaty of 1926. The text of this Declaration is as follows:

'It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886, and that any differences which may arise between our two Governments as to the validity of such claims shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of November 10, 1886, annexed to the said Treaty.'

"As the Declaration itself does not refer any dispute to the Permanent Court of International Justice, the contention of the Hellenic Government is that the Declaration is a part of the 1926 Treaty and as such is covered by the arbitration clause in Article 29. The appreciation of this contention depends on considerations of form as well as of substance.

"As to matters of form, it should be noted that the Treaty and the Declaration were treated as two separate instruments, in so far as they were drafted and issued as separate documents and signed separately. On the other hand, they were signed at the same time by the same signatories, and the Declaration was ratified by both Governments, together with the Treaty. That the two instruments were ratified together and covered by the ancient routine formula for ratifications does not necessarily mean that the one is to be regarded as a part of the other. As this point is developed in the Dissenting Opinion of President Sir Arnold McNair, I shall not deal further with it.

"As to matters of substance, it should be taken into consideration that nothing in the Treaty or Declaration indicates that the Declaration shall be regarded as a part of the Treaty. The Declaration does not present itself as an interpretation of any of the Treaty provisions, nor does it appear as an application of any of those provisions. It does not in any way modify the Treaty. It adds nothing to its provisions, nor does it subtract anything from them.

"It has been argued that the Declaration affects the interpretation of certain Articles of the 1926 Treaty in the sense that it prevents the coming into force of the Treaty from extinguishing claims which have accrued out of facts governed by the 1886 Treaty. The real and only scope of the Declaration is, however, in my opinion that it provides what is to be done with certain claims accrued under the 1886 Treaty when that Treaty disappears. It keeps such claims alive together with the arbitral procedure prescribed by the Protocol attached

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to the 1886 Treaty. It relates to the 1886 Treaty, and to that Treaty only.

" Having regard to these various considerations. I am inclined to hold that the Declaration cannot be regarded as a part of the 1926 Treaty, and that Article 29 therefore does not apply to it. I shall limit myself to these brief remarks with regard to this aspect of the matter, since the following considerations are, in my opinion, more conclusive. I shall now examine this preliminary dispute on the hypothesis that, contrary to my view, the Declaration does form a part of the Treaty.

" Article 29 contains a general arbitration clause by which the Parties 'agree in principle that any dispute that may arise between them as to the proper interpretation or application of any of the provisions of the present Treaty shall, at the request of either Party, be referred to arbitration'—arbitration by the Permanent Court of International Justice (or now by the International Court of Justice by the operation of Article 37 of the Court's Statute).

" The Declaration contains a special arbitration clause which refers disputes as to certain particular claims based on the 1886 Treaty to arbitration in accordance with the provisions of the 1886 Protocol. This special arbitration clause must, in accordance with general principles of interpretation, prevail over the general arbitration clause.

" In fact, the Parties agreed 'in principle' that disputes as to the interpretation or application of the provisions of the 1926 Treaty should be referred to the Court. But when they considered the particular claims based on the 1886 Treaty, they expressly provided that disputes as to such claims should be referred to the Arbitral Commission. They maintained for such disputes the arbitral procedure of the 1886 Protocol. The Parties agreed, in other words, that these two different methods of arbitration should exist side by side. Even if the Declaration is to be regarded as a part of the Treaty of 1926 the method of arbitration prescribed by Article 29 could not therefore be applied in the case of disputes concerning claims based on the Treaty of 1886. For such disputes the other method of arbitration was expressly maintained.

" I shall now take a step further and assume that, contrary to my view, Article 29 does apply to the Declaration, and that the Court has jurisdiction to interpret and apply this Declaration and to decide whether the United Kingdom Government is under an obligation to submit the present dispute to the Arbitral Commission.

" The Declaration contains various conditions for the submission of a dispute to that Commission. The claim must be 'based on the provisions of the Anglo-Greek Commercial Treaty of 1886'. It must be made 'on behalf of private persons'. The difference must have arisen 'between our two Governments'. It must relate 'to the validity of such claims'. In this connection should also be mentioned the contention of the United Kingdom Government that the claim must have been formulated before the Declaration was signed. This alleged condition invoked by the United Kingdom Government relates, in my opinion, as do all the other above-mentioned conditions, to the question of the interpretation or application of the Declaration and not to the question, now under consideration, as to whether the Court has jurisdiction to interpret and apply the Declaration. Further conditions are contained in the 1886 Protocol to which the Declaration refers.

" Before the Court could decide whether the United Kingdom Government is under an obligation to submit the dispute to the Arbitral

Commission, it would have to determine the conditions prescribed for such a submission and to ascertain whether these conditions are fulfilled.

"On the other hand, the merits of the dispute could not in any case, by virtue of the Declaration, be referred to the Court, since it is expressly provided in that Declaration that differences as to the validity of claims based on the 1886 Treaty shall, at the request of either Government, be referred to the Arbitral Commission.

"On the hypothesis that the Court has jurisdiction to interpret and apply the Declaration, there would thus be established a duality of jurisdiction with regard to disputes relating to such claims. For one and the same dispute there would be two different processes of arbitration. Questions relating to the interpretation or application of the Declaration and to a part of the 1886 Protocol, including the question of the competence of the Arbitral Commission, would have to be referred to the Court, while other questions arising out of the same dispute, including the appreciation of the merits, would have to be submitted to the Arbitral Commission. While, for instance, a difference as to the validity of a claim would have to be referred to that Commission, as expressly prescribed by the Declaration, the question whether the difference, in fact, does relate to the validity of the claim would have to be referred to the Court, since this is a condition for submission to arbitration and involves an interpretation or application of the Declaration.

"Such a dual arbitral procedure for one and the same dispute would be so complicated and artificial, so time-wasting and unusual, that it can hardly be believed to have been contemplated and accepted by the Parties to the Treaty and Declaration of 1926. In fact, they prescribed nothing of the kind, as far as I can see. They simply referred disputes concerning claims based on the 1886 Treaty to arbitration in accordance with the 1886 Protocol. They did not refer any question relating to such disputes to the Court. They did not prescribe that these disputes, or parts thereof, shall be settled by the method of arbitration provided for by Article 29 of the 1926 Treaty, though they could easily have done so if it had been their intention.

"It should, moreover, be taken into consideration that, according to a recognized principle of international law, an international tribunal has the power to determine its own competence. It would accordingly be for the Arbitral Commission itself to decide whether it is competent to deal with a dispute referred to it. The Commission could be excluded from exercising such a competence only by an express and clear provision to that effect; but no such provision limiting the competence of the Commission is contained in Article 29 of the 1926 Treaty or in the Declaration. It is difficult to believe that the Parties, by the provisions of Article 29, intended to confer also on the Permanent Court of International Justice the competence to decide whether a dispute is within the competence of the Arbitral Commission, thereby exposing themselves to the risk that the two tribunals might arrive at opposite results.

"For these reasons, I have arrived at the conclusion that the Court lacks jurisdiction in the matter. This conforms with the view expressed by the Greek Government in a note to the Foreign Secretary of the United Kingdom, dated August 6, 1940, in which it declared: 'From the enclosed Memorandum it clearly appears, in the opinion of the Royal Hellenic Government, that the Arbitral Committee provided for by the final Protocol of the Greco-British Commercial Treaty of 1886 is the only competent authority in the matter. . . .' This interpretation by the Greek Government itself as to the exclusive

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competence of the Arbitral Commission confirms the conclusion that the Court has no jurisdiction in the present case."

In his Dissenting Opinion Judge Hsu Mo said:

"The principal issue in the present case is not simply whether or not the Declaration of 1926 is a part of the Treaty of 1926. It is the question whether the Declaration constitutes a provision or provisions within the meaning of Article 29 of the Treaty so that that Article must apply to these provisions just as it must apply to all the provisions contained in the text of the Treaty itself.

"The facts with which the Court is concerned at this stage are that the Hellenic Government has taken up the claim of Ambatielos against the United Kingdom Government; that the Hellenic Government, invoking the Declaration of 1926, contends that the claim should be referred to arbitration in accordance with the provisions of the Protocol of November 19, 1886; and that the United Kingdom Government has declined to go to arbitration on the claim. There is thus a dispute between the two Governments relative to the interpretation and application of the Declaration. The Court is called upon to determine whether or not, acting by virtue of Article 37 of the Statute, it has jurisdiction to examine and settle this dispute.

"In order to determine this question, it is necessary to examine whether the Declaration should be regarded as being included in the expression 'any of the provisions of the present Treaty' contained in Article 29, paragraph 1, of the Treaty of 1926. The fact that the Declaration appears at the end of the Treaty, was signed on the same day as the Treaty, and may be considered to have been ratified, together with the text of the Treaty, by the United Kingdom Government as well as the Hellenic Government, merely tends to show that the Parties attached equal importance in law and gave the same degree of solemnity to the two documents, but does not necessarily prove that the Declaration is an integral part of the Treaty, much less that Article 29 of the Treaty applies to the Declaration in the same way that it applies to the provisions of the Treaty. The question at issue must be resolved by considering the substance of the Declaration and its relation to the Treaty itself.

"Prior to the conclusion of the Treaty of 1926, the Hellenic and the United Kingdom Governments had reached a *modus vivendi*, according to which the régime under the Treaty of 1886 and the Protocol annexed thereto would terminate upon the coming into force of the Treaty then under negotiation. The Declaration of 1926 produces no more effect than keeping alive the provisions of the Treaty of 1886 for the purpose of dealing with claims based thereon, as well as the arbitral procedure of settling any possible disputes concerning the validity of such claims. The Declaration did not in any way prevent the Treaty of 1926 from coming into full force upon the exchange of ratifications. It does not alter the situation which results from the operation of that Treaty. It does not add anything to nor detract from any of the provisions of the Treaty. It cannot be considered as forming any reservation to Article 32 or any other article of the Treaty which, as far as its own terms are concerned, can be properly interpreted and applied without reference to the Declaration at all. When any claims envisaged in the Declaration have to be dealt with, it is not any of the provisions of the Treaty of 1926 which will be relied upon by one or the other Party, but it is the Declaration and the relevant provisions of the 1886 Treaty which will come into play. Any relationship which the Declaration bears to the Treaty is purely negative in

character. The Declaration says, in effect: 'Notwithstanding the conclusion of the new Treaty, the provisions of the old Treaty may still be relied upon for certain purposes.' But for the Declaration, no claims based on the provisions of the 1886 Treaty could be entertained. This is not because they would have been wiped out by the 1926 Treaty, but because the 1886 Treaty with the Protocol, according to the *modus vivendi*, would have completely lost its force. The Declaration is thus not an interpretative clause of the Treaty of 1926; it rather constitutes a separate agreement whereby the Treaty of 1886, for certain purposes, has been given a new lease of life. In short, the Declaration has its own field of operation; it stands on an equal footing with the Treaty of 1926; it cannot be absorbed by Article 29 of that Treaty for the 'interpretation or application of any of the provisions of the present Treaty'.

"The independent nature of the Declaration is confirmed by an examination of the distinctive methods of arbitration provided for respectively in the Declaration and in Article 29 of the Treaty. In one case, it is arbitration by *ad hoc* commissions; in the other, it is, in principle, arbitration by a permanently established international Court. From the very terms of the Declaration and Article 29, it may be justifiably inferred that the intention of the Parties was to make the two distinctive methods of arbitration exist side by side so that one might be brought into operation without resort to the other. The Parties wanted to have all disputes relative to the claims based on the old Treaty settled by the original procedure of arbitration. They wanted to have all disputes relative to any provisions of the new Treaty settled by the new procedure of arbitration. They envisaged two distinctive sets of disputes and two distinctive methods of arbitration. There is no connecting link between the new and the old method of arbitration.

"It is difficult to believe that the Parties should have divided the process of settling disputes concerning claims based on the Treaty of 1886 into two successive phases. In the first phase any dispute concerning the obligation to submit to a Commission of Arbitration any claim based on the provisions of the 1886 Treaty, should be referred, unless otherwise agreed upon, to the Permanent Court of International Justice for settlement. Thus, the question of the existence or non-existence of a claim, of its being presented or not presented on behalf of private persons, or of its being based or not based on the provisions of the Treaty of 1886—in each case, a question concerning the interpretation or application of the Declaration—would logically belong to the first phase and would therefore fall within the jurisdiction of the Permanent Court of International Justice. After the dispute as to the arbitrable character of the claim had been settled in favour of the Government making the claim, there would begin the second phase of settlement, which would consist in referring the dispute as to the validity of the claim itself to a different organ, a commission of arbitration to be set up in accordance with the Protocol of 1886. There is absolutely no evidence to show that the contracting Parties desired to have what is in reality one and the same dispute settled by these two different methods and through these two different stages. Such dual procedure is so uncommon in international practice that it could not possibly be inferred from a reasonable interpretation of Article 29 of the Treaty of 1926 in conjunction with the Declaration.

"The procedure of arbitration prescribed in the Protocol annexed to the Treaty of 1886 is, after all, an ordinary system of settling international disputes. It was apparently in reliance upon mutual good

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faith that the Hellenic and the United Kingdom Governments kept alive that system in the Declaration of 1926, just as so many other States, reposing the same confidence in one another, have before and since accepted the same or similar system of arbitration in so many treaties or conventions. If, in 1926, the two contracting Parties had entertained any doubt as to the efficacy of arbitration by *ad hoc* commissions and had desired to ensure compulsory arbitration by a permanently established international Court in the case of disputes concerning claims based on the Treaty of 1886, they could have stipulated in the Treaty or in the Declaration, with the greatest ease and simplicity, that the method of arbitration provided for in Article 29 shall also apply to such disputes. The fact that they did not choose to do so shows clearly that it simply never occurred to them that the arbitration clause contained in the Declaration should be itself subject to a different method of arbitration.

"Even assuming that the Declaration does form a part of the Treaty of 1926, the clause of arbitration in the Declaration must be regarded as a specific provision, since it deals with a specific kind of dispute, whereas the arbitration clause in Article 29 must be regarded as a general provision, since it covers disputes relating to all the provisions of the Treaty. It is a well-recognized principle of interpretation that a specific provision prevails over a general provision. Therefore, even if the Declaration had actually been written into the Treaty as an additional article, it must, nevertheless, in the absence of any indication of intention to the contrary, form an exception to the applicability of Article 29.

"It is thus clear that this Court, as the substitute for the Permanent Court of International Justice, cannot exercise jurisdiction conferred upon it by Article 29 of the Treaty of 1926, in a dispute relative to the interpretation or application of the Declaration of 1926."

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Treaties—Forms of—Executive Agreements—The Law of the United States of America—Belligerent Occupation—Requisition of Private Property Under—Obligation to Pay Compensation.

ETLIMAR SOCIÉTÉ ANONYME OF CASABLANCA *v.* UNITED STATES.

United States, Court of Claims.
July 15, 1952.

THE FACTS.—In 1946, the Governments of France and the United States entered into the "Byrnes-Blum Agreement", which provided, *inter alia*, that, "the French Government has agreed to process and pay all unpaid claims of French residents against the United States arising out of . . . the requisitioning by the United States Government for use in the war program of any property interest owned by French residents. . . ." Six thousand two hundred and eighty bales of cork, property of the plaintiff, were requisitioned by the United States Army in Morocco in 1942. In 1947, the plaintiff accepted payment of a preliminary award on account by the French Commission which was set up in pursuance of the Agreement, and, at the time of the instant suit, had a claim

pending before the Commission for the balance. In 1948, the plaintiff nevertheless filed suit in the United States Court of Claims, alleging that the taking of its cork was not a requisition within the meaning of the Byrnes-Blum Agreement, and that consequently the United States was liable therefor.

Held: that the plaintiff's claim must be dismissed, being embraced by the Agreement. Having pursued a remedy before the French Commission, the plaintiff would be held to his election, and the Commission's findings accepted as conclusive. The Court said:

"The Byrnes-Blum Agreement between the United States and France is the type of agreement which has been recognized as a treaty within the meaning of Article VI, clause 2, of the Constitution and thus is a part of 'the supreme Law of the Land'. *United States v. Pink*, 315 U.S. 203, 228-230, 62 S.Ct. 552, 86 L.Ed. 796; *United States v. Belmont*, 301 U.S. 324, 330-331, 57 S.Ct. 758, 81 L.Ed. 1134; *B. Altman & Co. v. United States*, 224 U.S. 583, 600, 32 S.Ct. 593, 56 L.Ed. 894. In the *Belmont* case the Supreme Court said, 301 U.S. at p. 330, 57 S.Ct. at p. 760:

'... Governmental power over external affairs is not distributed, but is vested exclusively in the national Government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that Government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Article 2, section 2), require the advice and consent of the Senate.

'A treaty signifies "a compact made between two or more independent nations, with a view to the public welfare." . . . But an international compact, as this was, is not always a treaty which requires the participation of the Senate. . . .'

"This Court has recently had occasion to consider the effect of treaties and international agreements upon the consent of the United States to be sued in the case of *Hannevig v. United States*, 84 F.Supp. 743, 114 Ct.Cl. 410. At p. 745 of 84 F.Supp., at pp. 414 and 415 of 114 Ct.Cl. we said:

'The consent given by the United States to be sued is not a vested right and such consent may be modified or withdrawn at any time. . . .'

'Plaintiff admits that the sovereign may modify or withdraw its consent to be sued but says that the Convention ratified April 30, 1948, does not supplant or override existing law; that it is a mere contract and should not be construed as divesting this Court of jurisdiction of plaintiff's claim because the convention or treaty was not self-executing and does not, therefore, have the force and effect of an act of Congress. We think the

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rule upon which plaintiff relies is not applicable here. . . . The treaty making power embraces the rights and privileges of foreign nationals, and settlement of claims such as the one here involved has long been recognized as a proper subject of treaties and international agreements.'

"The plaintiff has argued in its brief that even if the cork had been requisitioned by the Army in Morocco, nevertheless the requisition would not be within the terms of the Byrnes-Blum Agreement for the reason that under that Agreement the property of a French resident must be requisitioned in the United States. The language contained in paragraph 6 (c) of the Agreement clearly does not contain any such limitation as it specifically refers to property 'owned by French residents . . . in France or French overseas territories. . . .' Furthermore, the official interpretation by the French Government and the United States Department of State is that the expression 'French resident' includes residents of French overseas territories and that Morocco is included in the expression 'French overseas territories' and, further, that a corporation organized under the laws of the French Zone of Morocco falls within the scope of the expression 'French residents'. In the official interpretation of paragraph (6) (c) by the Department of State above quoted, the Department specifically points out that the French version of the Memorandum of Understanding of the Byrnes-Blum Agreement equally authentic with the English version, refers in literal translation, to the persons involved in this paragraph as 'persons resident in France or in French overseas territories'. Furthermore, it is established by the evidence that in acting under the terms of the Agreement, the French Government accepted, processed, and paid claims of Moroccan residents and corporations against the United States growing out of the requisitions by the United States armed forces of the property of such residents.

"Under these circumstances we must reject plaintiff's contention that the property requisitioned by the United States Government was limited only to property requisitioned within the United States. We conclude, therefore, that the plaintiff was a French resident within the terms of the Agreement and consider now whether or not the plaintiff's property was 'requisitioned' by the United States Army.

"Plaintiff argues that while the acquisition of the cork by the United States Army did not constitute a requisition, nevertheless the transaction did give rise to an implied contract on the part of the United States Government to pay plaintiff its reasonable value.

"There are two types of requisitions recognized and employed by the Army: (1) formal or regular requisitions and

(2) informal or irregular requisitions. Property is acquired by the Army by irregular requisitions in times of emergency, in combat areas, and by armies in the field when circumstances do not permit time-consuming formalities. The Army recognizes and pays for property acquired by irregular requisition. This Court recognizes irregular requisitions made in times of emergency and such requisitions of private property by the Army are analagous to the taking of private property by eminent domain. There is no question but that such an irregular requisition gives rise to an implied contract which calls for the payment of the fair market value of the property at the time and place of its taking. *Salomon v. United States*, 19 Wall. 17, 22 L.Ed. 46; *Walker v. United States*, 34 Ct. Cl. 345.

"Plaintiff says that since the defendant seized the cork and shipped it to the United States as shipping space became available and disposed of most of it through commercial channels, the concept of requisitioning for its own use for war purposes was thereby destroyed. What happened to the cork after it was originally seized by the United States is of no concern to the plaintiff.

"As this Court stated in *Walker v. United States*, *supra*, 34 Ct.Cl. at pp. 346, 347:

'In ordinary cases coming under the general jurisdiction of the Court where private property is taken for public use, an action on the implied contract can be maintained. In cases of implied contract, it was established by the decision in the Supreme Court in *Salomon's Case* (19 Wall., p. 17 [22 L.Ed. 46]) that where private property was delivered to an officer for public use a contract will be implied though the property was not used, and the Government received no benefit from it. As a general principle, it may be said that where private property is taken for public use under conditions which will authorize a court to hold it a case of implied contract, the title passes to the Government, *eo instanti*, and it is no concern of the owner as to what use or purpose the Government puts it or whether the property perishes in its hands.'

"At the time this property was taken the defendant was engaged in a major offensive in the African Campaign of World War II. The Port of Fedala with its berthing facilities for only one ship at a time and the available dock space was greatly needed for the loading and unloading of wartime supplies and troops. Unquestionably, 6,688 bales of cork took up a great deal of the space on the Fedala dock and since it had lain there for months disintegrating in the elements we cannot conceive, and the testimony does not indicate otherwise, that the cork had any value whatsoever to the United States as such. The Army authorities were interested in obtaining the facilities of the dock at the Port of Fedala for wartime

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use and as long as plaintiff's cork remained on the dock the much needed facilities were not available to them. Thus the Army took the cork, moved it away, and acknowledged at that time its obligation to pay plaintiff the reasonable value of the number of bales so taken. The Army recognized the transaction as an irregular requisition, and this Court recognizes it as such along with the obligation of the defendant to pay.

"The Rules of Land Warfare contained in War Department Basic Field Manual, FM 27-10, pp. 84-85 (1940), deal with requisitioning by the Army. Paragraph 336 provides in pertinent part:

'Practically everything may be requisitioned under this Article (Article LII of the regulations above quoted) that is necessary for the maintenance of the Army and not of direct military use, . . .'

"Paragraph 339 of these Rules sets forth the established policy of the Army in attempting to make prompt settlement for goods so taken, wherein it provides in part:

'All authorities agree that it is good policy to pay cash if possible and to *take up receipts as soon as possible.*'

"Colonel Gardes admitted the liability of the Army for 6,280 bales of cork and had plaintiff accepted this count instead of persisting as it did until January 1951, the date of this trial, for payment of 6,688 bales, we have no doubt that it would have long since been paid.

"We find that plaintiff's property was duly requisitioned by the Army of the United States and that the transaction gave rise to an implied contract on the part of the defendant to pay the reasonable value of the property so taken. We further find that the French Commission possessed complete authority to settle all claims of this nature which remained unsettled on April 4, 1947. The Commission made its award to plaintiff which was later modified by the French Minister of Finance to cover the value of 6,280 bales of cork, the number of bales which plaintiff has conceded before this Court to be the number of bales for which it seeks payment.

"Having reached this conclusion we are bound to accept the finding of the French Commission as to the reasonable value of the cork.

"Plaintiff submitted his claim to the French Commission and therefore elected to pursue that remedy. Accordingly, we will dismiss plaintiff's petition and enter judgment in favour of defendant."

[Reports: 106 F. Supp. 191; 123 Ct.Cl. 552.]

NOTE.—Such implications as this case may contain to the effect that the United States executive agreements may impair constitutional rights are pronounced to be overruled in *Seery v. United States* (1955), 127 F. Supp. 601, 130 Ct. Cl. 489, to be reported in *International Law Reports*, 1955. See, with respect to international agreements to which the United States is a party which “do not rise to the dignity of treaties”, *Cross et Al. v. Pace* (1952), 106 F. Supp. 484. For a holding that alien friends are insured compensation for property taken in wartime by the United States Constitution, see *Baras Plantation Co. v. United States* (1952), 105 F. Supp. 1003. For an analysis of provisions of the Treaty of Peace with Italy of 1947 relating to waiver of private claims, see *Neri v. United States* (1952), 102 F. Supp. 718 (1953) 204 F. 2d 867.

Treaties—Forms of—Concessionary Contract between Government and Company—Assimilation to Treaty.

See Case No. 114 (*Anglo-Iranian Oil Co. Case (Preliminary Objection)*).

III.—Conclusion of Treaties. Signature. Accession and Adhesion. Tacit Renewal

Treaties—Conclusion of—Requirement of Parliamentary Approval—Whether Treaty Lacking Parliamentary Approval Confers Rights on Individuals—Agreement between Governments of Austria and United States—Reciprocal Undertaking by Government of Austria to Satisfy Claims of Individuals Suffering Damage by reason of Acts of United States Armed Forces—Whether Agreement Confers Rights on Individuals against Republic of Austria—The Law of Austria. **Case No. 98**

POKORNY AND ANOTHER *v.* REPUBLIC OF AUSTRIA.

Austria, Supreme Court.
February 20, 1952.

THE FACTS.—By an Agreement of June 21, 1947 (*U.N.T.S.*, Vol. 67, p. 89), between the Government of the United States of America and the Government of the Republic of Austria the United States Government undertook to pay a global sum of money to the Austrian Government and the Austrian Government undertook to satisfy all claims that might be made by individual citizens in respect of damage to their property occasioned by members of the United States armed forces. The Agreement was published in the “unofficial” part of the Vienna Gazette (*Wiener Zeitung*) on June 28, 1947. The plaintiffs, refugees from Czechoslovakia, arrived in Austria towards the end of hostilities in the Second World War, bringing with them valuable personal effects which were stored in an Austrian convent. These effects—as was alleged by the

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plaintiffs—were subsequently stolen by members of the United States armed forces, and in this action the plaintiffs claimed compensation from the Republic of Austria, their contention being that the Agreement of June 21, 1947, had the effect of making the Republic of Austria liable *vis-à-vis* individual citizens who had suffered damage by reason of acts committed by members of the United States forces. On behalf of the Republic of Austria it was contended that the Agreement between the two Governments was a treaty of a “nature to bring about a change in municipal law” within the meaning of Article 50 of the Austrian Constitution, and as such invalid without the prior consent of the the Austrian Parliament; as it had not received such consent, it was invalid in Austrian municipal law and incapable of conferring rights upon the plaintiffs as against the Republic of Austria. It was further contended that as a treaty of this nature it should have been, but was not, promulgated in the Federal Statutory Gazette (*Bundesgesetzblatt*), and that for this reason also it could not be relied upon by the plaintiffs.

Held: that the Agreement, in the absence of compliance with the provisions of the Austrian Constitution, was invalid and unenforceable as not having been expressly enacted by means of a municipal statute, and that the appeal of the Republic of Austria must accordingly be allowed. The Court said:

“According to Article 50 of the Federal Constitution, all political treaties—and other treaties only if their content is such as to change the law—require the consent of Parliament in order to be valid. Such treaties must be promulgated by the Federal Chancellor in the Federal Statutory Gazette, and in the absence of provision to the contrary they begin to operate as from the end of the day of promulgation. It is doubtful whether these constitutional provisions were complied with in the present case and whether, having regard to the said provisions, the Treaty of June 21, 1947, has immediate municipal force in accordance with the so-called rule of general transformation which is applicable to all treaties. It may be doubted whether this is a political treaty. This question need not be determined because the Agreement of June 21, 1947, is in any event of a nature to bring about a change in municipal law. The Austrian Government undertook, *vis-à-vis* the United States of America, to satisfy the liabilities of the United States which are more particularly defined in the Agreement and which had arisen between April 9, 1945, and June 30, 1947, as a result of acts committed by the United States armed forces and services in

Austria. In consideration of this undertaking the Republic of Austria received some 308 million Austrian shillings in full and final settlement of the claims referred to. . . . There can be no doubt that this Agreement created at least the possibility of future expenditure for which no provision was made in the Federal Finance Act or in any other Statute, and which expenditure, before it could be incurred, would have required the consent of Parliament at the instance of the Federal Minister of Finance. In this respect the Agreement brings about a change in the law because the Finance Act of 1947 did not provide for this expenditure. It accordingly falls within the framework of Articles 48 and 50 of the Constitution. In fact, the Agreement was not submitted to Parliament for the latter's consent, nor promulgated in the Federal Statutory Gazette. We must therefore negative its municipal and constitutional validity. . . . Having regard to the fact that this Court has answered in the affirmative, for the reasons given, the question whether the Treaty has a content which changes the law, the express provision of Article 49 (1) of the Constitution does not seem to have been complied with, because the Treaty was only published in the official Vienna Gazette of June 28, 1947, but not in the Federal Statutory Gazette. In so far as concerns the municipal sphere, therefore, this Treaty must be regarded as null and void. Thus the claim forming the subject-matter of this action is devoid of any legal basis."¹

[Report: ÖZÖR, 1952, p. 563.]

Treaties—Conclusion of—Constitutional Limitations—Political and Commercial Treaties—Treaties Requiring Parliamentary Approval—Treaties Valid without Parliamentary Approval—The Constitutional Law of Germany. **Case No. 99**

COMMERCIAL TREATY (GERMANY) CASE.

German Federal Republic, Federal Constitutional Court.
July 29, 1952.

THE FACTS.—Article 59 (2) of the Constitution of the Federal German Republic provides as follows:

“Treaties which govern the political relations of the Federal German Republic or are concerned with matters within the legislative competence of the Federal Republic require the consent . . . of the organs competent for the enactment of federal law in the form of federal statutes.”

¹ See also the judgment of the Supreme Court of February 20, 1952, in *Hafferl v. Republic of Austria*: 2 Ob 756/51 (unreported).

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The Government of the Federal Republic of Germany concluded a Commercial Treaty with France without, however, submitting it to Parliament for approval. The parliamentary section of the Social-Democratic Party thereupon instituted proceedings against the German Government and contended that the Treaty, being a treaty "governing the political relations of the Federal Republic", was invalid unless first passed into law by Parliament as provided in Article 59 (2) of the Constitution. The Government of the Federal Republic, on the other hand, contended that this was not a political treaty and that it was therefore valid without parliamentary approval.

Held: that only treaties "affecting the existence of the State, its territorial integrity, its independence and its position or relative weight within the community of States" were political treaties, and that as the Commercial Treaty with France was not a treaty affecting any of these matters, it was valid without parliamentary approval. The Court said:

"A treaty does not become a political treaty within the meaning of Article 59 (2) of the Constitution merely by reason of the fact that it deals quite generally with public affairs, the good of the community, or affairs of State. If this were so, every treaty would be a political treaty, and the limitation contained in Article 59 (2) would be devoid of meaning. In addition to the matters here referred to, a treaty must directly affect the existence of the State, its territorial integrity, its independence and its position or relative weight within the community of States. Such are, above all, alliances, treaties of guarantee, treaties relating to political co-operation, peace treaties, non-aggression pacts, treaties of neutrality and disarmament, treaties of arbitration and similar international agreements. The history of Article 59 (2) of the Constitution indicates that there shall be room for an interpretation which will do justice to constantly changing conditions. In contradistinction to the Weimar Constitution (Article 45), the Constitution of the Federal Republic has adopted a wider terminology so as to extend beyond alliances the category of treaties requiring the approval of Parliament. . . . The contents and object of a treaty within the meaning of Article 59 (2) must be directed towards governing political relations with foreign States. The content or purpose of the treaty *itself* must be to govern political relations with foreign States; this purpose must not be secondary, or perhaps even unintentional or unexpected in its bearing on such relations. If, therefore, a treaty is of political significance for the Federal Republic merely because it has an important bearing on the

internal political, economic or social conditions of the country, it does not thereby become a political Treaty within the meaning of Article 59 (2) of the Constitution. There was a time when the doctrine of international law generally did not regard commercial treaties as political treaties. This theory, however, does not in its generality correspond to the reality of present-day international relations. In special circumstances, a commercial treaty may be as much in the nature of a political treaty as an alliance. This might be so where the Contracting Parties, by concluding a commercial treaty, intend to strengthen their economic position in competition with other States generally. In a case of that kind non-political market relations may become power relations. It is possible nowadays for the power position of a State within the community of States to be influenced more strongly by the conclusion of a commercial treaty than by the conclusion of a treaty of neutrality, a non-aggression pact or a treaty of guarantee. In referring to power in this context we do not confine ourselves to the position of States in the struggle for political hegemony, but we refer generally to their relative weight within the community of States. Whether a treaty within the meaning of the foregoing considerations is a political treaty can only be determined *in each individual case* by reference to the special circumstances and the actual political situation of the Federal Republic and the other Contracting Parties."

The Court then examined the contents of the Treaty and pointed out that it dealt only with purely technical questions of a commercial nature. The Court added that in any event the Federal Republic of Germany was not at that time in a position to make political decisions, having regard to the occupation régime to which it was then subject. It stressed more particularly the following facts, namely, that the Treaty did not contain any provision indicating a desire on the part of the Federal Republic to support so-called European integration, nor an acknowledgement that the Saar Territory was no longer part of Germany. In the result, as indicated, the Court denied the political character of the Treaty.

[Reports: JZ, 7 (1952), p. 557; NJW, 5 (1952), p. 970.]

IX.—Operation and Enforcement of Treaties. Necessity for Municipal Legislation

[See also PART I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; and PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.]

Case **Treaties—Operation and Enforcement of—Necessity for**
No. 100 **Municipal Legislation—Self-Executing Treaties—The Law**
 of the United States of America—Interpretation of General
 International Conventions—Convention on Shipowners’
 Liability—General Maritime Law.

WARREN *v.* UNITED STATES.

United States, Supreme Court.
February 26, 1951.

THE FACTS (from the decision of the Supreme Court).—
“Petitioner seeks in this suit maintenance and cure from the United States, as owner of S.S. *Anna Howard Shaw*. Petitioner was a messman who went ashore on leave while the vessel was at Naples in 1941. He and two other members of the crew first did some sightseeing. Then the three of them drank one bottle of wine and went to a dance hall, where they stayed an hour and a half, dancing. There was a room adjoining the dance hall that overlooked the ocean. French doors opened on to an unprotected ledge which extended out from the building a few feet. Petitioner stepped to within six inches of the ledge and leaned over to take a look. As he did so, he took hold of an iron rod which seemed to be attached to the building. The rod came off and petitioner lost his balance and fell, breaking a leg.”

The District Court *held* that the petition must be granted. It held that the Court had jurisdiction, that the petitioner was “in the service of his ship” at the time of the accident, that he was an employee of the general agent of the owner, and that he was not so under the influence of liquor as to be barred from recovery and had not been guilty of gross negligence contributing to his injury. A motion for rehearing was denied. On appeal, it was *held* by the Court of Appeals that the judgment of the Court below must be reversed. The petitioner was guilty of gross negligence barring him from recovery.

On petition for rehearing, it was *held* by the District Court that the petition must be denied. In the petition for rehearing, the contention was presented that the decision disregarded the provisions of the Shipowners’ Liability Convention of 1936 proclaimed by the President to be effective as to the United

States and its citizens as of October 29, 1939. Article 2 of the Convention provides as follows:

" Article 2.

" 1. The shipowner shall be liable in respect of—

" (a) sickness and injury occurring between the date specified in the articles of agreement for reporting for duty and the termination of the engagement.

" (b) death resulting from such sickness or injury.

" 2. Provided that national laws or regulations may make exceptions in respect of:

" (a) injury incurred otherwise than in the service of the ship;

" (b) injury or sickness due to the wilful act, default or misbehaviour of the sick, injured or deceased person;

" (c) sickness or infirmity intentionally concealed when the engagement is entered into.

" 3. National laws or regulations may provide that the shipowner shall not be liable in respect of sickness, or death directly attributable to sickness, if at the time of the engagement the person employed refused to be medically examined."

It was argued that while clause 1 was self-executing, the exceptions permitted by clause 2 did not become operative without express Congressional action putting them into effect.

The Court held that if clause 1 of Article 2 was self-executing, so also was clause 2. If, on the other hand, clause 1 of Article 2 was not self-executing, the Convention did not apply. Either construction of clause 1 led to the conclusion that the Court's decision was not affected by the terms of the Convention.

On writ of *certiorari*,

Held (by the Supreme Court, Jackson, Clark, Frankfurter JJ. dissenting): that the judgment of the Court of Appeals must be reversed, and the petition for maintenance and cure granted. The Court said:

" Petitioner's argument is twofold. He maintains first that under paragraph 1 [of the Convention] a shipowner's duty to provide maintenance and cure is absolute and that the exceptions specified in paragraph 2 are not operative until a statute is enacted which puts them in force. He argues in the second place that even if paragraph 2 is operative without an Act of Congress, his conduct was not due to a 'wilful act, default or misbehaviour' within the meaning of that paragraph. An *amicus curiae* argues that the injury was not received 'in the service of the ship' within the meaning of paragraph 2 (a) of Article 2.

" Our conclusion is that the exceptions permitted by paragraph 2 are operative by virtue of the general maritime law and that no Act of Congress is necessary to give them force.

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"The language of paragraph 2, in its ordinary range of meaning, easily permits that construction. It is 'national laws or regulations' which may make exceptions. The term law in our jurisprudence usually includes the rules of court decisions as well as legislative acts. That was held in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 819 82 L.Ed. 1188, to be true of the phrase 'The laws of the several States' as used in the first Judiciary Act. No reason is apparent why a more restricted meaning should be given 'national laws or regulations'. The purpose of the Convention would not be served by the narrow meaning. This Convention was a product of the International Labor Organization. Its purpose was to provide an international system of regulation of the shipowner's liability. That international system was aimed at providing a reasonable average which could be applied in any country. We find no suggestion that it was designed to adopt a more strict standard of liability than that which our maritime law provides. The aim indeed was not to change materially American standards but to equalize operating costs by raising the standards of member nations to the American level. If the Convention was designed to make absolute the liability of the shipping industry until and unless each member nation by legislative Act reduced it, we can hardly believe some plain indication of the purpose would not have been made. Much of this body of maritime law had developed through the centuries in judicial decisions. To reject that body of law and start anew with a complete code would be a novel and drastic step. Under our construction the Convention provides a reasonable average for international application. The definition of the exceptions itself helps provide the average, leaving the creation of the exceptions to any source of law which the member nations recognize. That view serves the purpose of the Convention and conforms to the normal meaning of the words used. Our conclusion is that both paragraph 1 and paragraph 2 of Article 2 state the standard of liability which legislative and decisional law define in particularity."

The Court then held that petitioner was not guilty of wilful misbehaviour within the meaning of the Convention and that the petitioner was "in the service of the ship" as provided in paragraph 2 (a) of Article 2 of the Convention.

Jackson and Clark JJ. dissented on the ground that the injuries were not sustained in the service of the ship.

Frankfurter J. dissented, saying:

"We brought this case here because it involved construction of the Shipowners' Liability Convention, 54 Stat. 1693. As to that, I agree with the Court that the Convention does not afford any basis for libellant's claim. Assuming that Article 2

of the Convention is self-executing, a matter which I do not now have to decide, the exceptions permitted by paragraph 2 of that Article are operative by virtue of the general maritime law. But I am unable to agree that we should reverse the Court of Appeals on its application of the proper standard to the facts."

He concluded that the petitioner's conduct was "a deliberate act of indiscretion, barring any right to maintenance and cure."

[Reports: 75 F.Supp. 210; 1948 A.M.C. 375; 76 F.Supp. 735; 1948 A.M.C. 568; 179 F. 2d 919; 1950 A.M.C. 263; 340 U.S. 523; 71 Sup. Ct. 432; 95 L.Ed. 503.]

NOTE.—The decision of the Supreme Court is noted in *American Bar Association Journal*, 37 (1951), p. 372; *Annual Survey of American Law*, 1951, pp. 17, 552; *Michigan Law Review*, 50 (1952), p. 435. The decision of the Court of Appeals is noted in *California Law Review*, 38 (1950), p. 900.

Treaties—Operation of—Whether National of a State Not a Party to a Treaty May Receive Benefits Thereof—International Air Law—Whether Nationality Affects Rights Thereunder. **Case No. 101**

GLENN v. COMPANIA CUBANA DE AVIACION, S.A., ET AL.

United States, District Court, Southern District of Florida.
February 1, 1952.

THE FACTS.—The plaintiffs, minors, sued the defendant, another airline and the United States for damages for the death of their parents, allegedly caused by the collision in flight of a United States naval plane and the airplane on which the decedents were riding as passengers, and the negligence of all three defendants. On motions to strike out portions of the defendants' answers, the Court considered, *inter alia*, whether the defendant Compania Cubana de Aviacion S.A. received the benefit of the exemptions from and limitations of liability of the Convention for the Unification of Certain Rules Relating to International Transportation by Air and the Additional Protocol signed at Warsaw, October 29, 1929 (the Warsaw Convention), even though Cuba was not a contracting Party. On this question, it was

Held: that the Cuban defendant must receive such benefits, since the Convention was to be applied by the courts of the parties to it regardless of the nationality of either carrier or passenger. The Court said:

"In Chapter I, Article 1, of the Convention it is provided

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that the Convention applies to 'all international transportation of persons . . . performed by aircraft for hire'. Said Article 1 further reads, in part, as follows: '(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this Convention'.

"I have not been referred to any case in which the carrier, claiming the benefits of the exemptions from and limitations to liability contained in the Warsaw Convention, has been a national of a noncontracting party.

"However in the case of *Garcia v. Pan American Airways, Inc.*, 269 App. Div. 287, 55 N.Y.S. 2d 317, 322, affirmed 295 N.Y.852, 67 N.E. 2d 257, *certiorari* denied 329 U.S. 741, 67 S.Ct. 79, 91 L.Ed. 640 and 338 U.S. 824, 70 S.Ct. 70, 94 L.Ed. 500, the Court uses the following language: 'The Convention is not concerned with reciprocal treatment of nationals; its purpose is to unify rules relating to international transportation by air. There is nothing in the Convention which conditions its application upon nationality but, on the contrary, its provisions affect the rights of all litigants. It must be so enforced.' In the *Garcia* case the contention had been made that the Convention did not apply, as both passenger and carrier were citizens of the same nation, the United States.

"It is to be noted that the Convention makes no reference to the citizenship of passengers and carriers, but bases the applicability of its provisions entirely upon the character and nature of the transportation, as defined and limited in Chapter I, Article 1.

"As stated by the Supreme Court in *Rocca v. Thompson*, 223 U.S. 317, 32 S.Ct. 207, 210, 56 L.Ed. 453: 'It is further to be observed that treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties.'

"It is my opinion that the Convention was designed to provide an international code declaring the rights and liabilities of parties to international carriage contracts by air and is to be applied by the courts of the various countries adopting the

Convention. *Grein v. Imperial Airways, Ltd.*, [1937] 1 K.B. 50, 1 Avi. 622. And this is true regardless of the citizenship of either carrier or passenger. I, therefore, hold, on the pleadings, that the provisions of the Convention apply, irrespective of the Cuban citizenship of the defendant carrier Cubana."

[Report: 102 F. Supp. 631.]

NOTE.—This case is discussed in *International and Comparative Law Quarterly*, 1 (1952), p. 242. With respect to the character of the Warsaw Convention as an international code of air law, and its self-executing nature, see also *Salamon v. Koninklijke Luchtvaart Maatschappij, N.V.* (1951), 107 N.Y.S. 2d 768.

Treaties—Operation and Enforcement of—Absence of Publication—Relevance of—Interpretation of Treaties—Reference to Preparatory Work. **Case No. 102**

BOILEAU *v.* MÉLARD AND WYCKMANS.

Belgium, Court of Appeal of Liège.
March 23, 1952.

THE FACTS.—This was an action arising out of an accident of navigation on the Rhine at Lobiter, in Netherlands territory. The Commercial Court of Liège ordered an expert inquiry into the accident, with the agreement of all the parties concerned. Subsequently, however, the present appellant entered a plea to the jurisdiction of the Belgian courts, and invoked Article 34 of the Convention of Mannheim concerning navigation on the Rhine, of October 17, 1868, which provides that jurisdiction concerning navigation accidents on the Rhine lies exclusively with the Rhine Tribunals. The Court of first instance rejected that plea. On appeal,

Held: that the appeal must be rejected. Belgium was not a party to the Convention of Mannheim and the Convention was therefore not applicable in Belgian courts. The Court said:

"Belgium was not a party to the Convention of Mannheim of 1868. The appellant argues that it became a party thereto as a result of the ratification of the Treaty of Versailles of June 28, 1919, which was said by Articles 354 and 355 to have imposed the régime of 1868 on the States thenceforward represented on the Central Commission for Navigation on the Rhine. However, the Mannheim Convention has not been published in Belgium. It is accordingly not binding on Belgian nationals in so far as it may affect their private or public rights.

"Even assuming the applicability of the Convention of Mannheim—which is not admitted—to Belgian boatmen navigating the Rhine, as a result of the ratification by Belgium

of the Treaty of Versailles, Article 34 of that Convention cannot be interpreted in the manner suggested by the appellant. It cannot be admitted that that provision would prevent Belgian citizens from seising Belgian courts of a private dispute, not involving any alien, in respect of which they are competent under Belgian law. Neither the text of the Convention nor the protocol of closure authorizes such an interpretation.

"The appellant relies on discussions preceding the signature of the Convention. However, those discussions could not serve any purpose other than demonstrating a difference of views between the plenipotentiaries of the contracting parties. That divergence, in itself, proves that Article 34 of the Convention does not have the greatly extended meaning which the appellant gives it; the meeting of wills requisite for the conclusion of an international Convention must bear on all the points covered by the treaty. In any case Belgium can only be bound by the terms of official acts.

"Finally, there appears to be no consideration of public international policy (*principe d'intérêt public international*) which would prevent the parties from submitting private disputes to their national courts. This is so, in particular, when the parties, as in this case, were agreed on the competence of the national courts."

[Report: *Pasicrisie belge* (1952), II, p. 64.]

Case No. 103 **Treaties—Operation of—Implied Reference to National Law—Allied Armies in Belgium—Requisitions by—The Law Applicable.**

NON-PROFIT-MAKING ASSOCIATION "TUDONENSIA CATHOLICA"
v. OFFICE FOR MUTUAL AID (O.M.A.).

Belgium, Tribunal Civil of Hasselt.
July 10, 1952.

THE FACTS.—The plaintiffs were the owners of a hall which had been requisitioned by British soldiers on December 30, 1944, for the purposes of a musical performance. An hour and a half after the termination of the performance the hall was completely destroyed by fire. The caretaker was the only person who had entered the hall in the intervening period. The plaintiffs now sued for compensation for the destruction of the hall. They relied on Article 23 of the Belgian Law concerning military requisitions, of May 12, 1927, which provides that the requisitioning authority is presumed to be responsible for damage to requisitioned property, unless it proves that the damage is due to other causes. It was contended on behalf of the defendants, the O.M.A., that the Belgian Law was not

applicable to requisitions by Allied nationals, and that these were governed exclusively by the Decree-Law of December 31, 1945, and the Memoranda of Agreement of May 9 and June 26, 1945, between Belgium and the Supreme Command of the Allied Armies.

Held: that the plaintiffs were entitled to recover. Belgian law was applicable to the requisition. The Court said:

"The Agreements of May 9 and June 26 provided that requests for indemnity arising out of requisitions shall be settled by Belgium. It may be remarked that Belgium undertook this obligation on the basis of mutual aid in a common war, *i.e.*, it must be understood that it represented a part of Belgian participation in the war.

"Accordingly, requisitions made on Belgian territory by the Allied armies were, in law, made on the authority and on behalf of the Belgian State. In these circumstances, the defendants, representing the Belgian State by virtue of an agreement between it and the Allies, cannot deny the applicability of Belgian law, and, in particular, that of May 12, 1927.

"Moreover, the Memoranda of Agreement and the Decree-Law of December 31, 1945, only laid down the principle of indemnity and the procedure necessary for obtaining it, and did not deal with the manner in which proof of damage must be made. It cannot be conceived that the negotiators of this inter-Allied Agreement, and the Belgian legislature, would have forgotten such an important point, if they had not tacitly accepted the provisions of the Law of May 12, 1927.

"They made no reference to the application of foreign laws concerning requisitions, which cannot be binding within Belgium unless a national law refers to them."

[Report: *Pasicrisie belge* (1953), III, p. 44.]

Treaties—Operation of—Cause of Action Arising out of a Treaty—Effects Subsequent to Termination of Treaty—Retroactive Effect of Treaty—The Law of Argentina. **Case No. 104**

NATIONAL GOVERNMENT (MINISTRY OF MARINE) *v.* CHIARANI.

Argentina, Court of Second Instance, Buenos Aires.

June 3, 1952.

THE FACTS.—On October 31, 1947, Cándido Chiarani, his wife and their two children left Italy for Argentina under the terms of the Immigration Agreement of February 21, 1947, between Argentina and Italy, which provided that the cost of passage would be borne by the immigrant but that the Argentine Government might advance the necessary funds subject

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to later reimbursement by the immigrant. The Ministry of Marine paid the passage of the Chiarani family. After reaching Argentina, the defendant signed a contract of employment with the Ministry of Marine, retroactive to the date of departure from Italy, which provided for reimbursement of the funds if the contract were cancelled before completion. On January 26, 1948, the two States concluded another Immigration Agreement, which superseded the earlier one and provided that the Argentine Government would assume responsibility for transportation costs of immigrants. In April 1949, Chiarani was dismissed by the Ministry of Marine for misconduct (*inconducta*). The Ministry then sued to recover the cost of passage. The defendant pleaded, *inter alia*, that the 1948 Immigration Agreement, having superseded the 1947 one, was applicable in the instant case and that right of recovery existed under the 1948 Agreement only "if the immigrant has abandoned without cause within a period of two years that employment, profession, or other function which he contracted to undertake in order to secure admission to the Republic." Chiarani appealed from the judgment of the Court below in favour of the Government.

Held: that the obligation to pay the debt must be affirmed. An obligation arising under an international agreement does not terminate when the agreement is superseded, in the absence of a specific provision to that effect in the later Agreement. The Court said in part:

"The obligation which is the basis of the present claim was initiated at that time [*i.e.*, on October 31, 1947, the date of embarkation] and is governed, therefore, by the law in effect at that time; the juridical consequences of said obligation may not be changed or modified by a later law (Article 3, Civil Code). The law which was in effect on the date of departure of the immigrant—which date is established by the fact of the delivery of the tickets or their equivalent in cash—is the Immigration Treaty concluded by Argentina and Italy at Rome on February 21, 1947, which provides, as mentioned above, that the necessary expenses of the trip from an Italian port to an Argentine port will be borne by the immigrant but that the Argentine Government may advance the fare on condition of subsequent reimbursement by the immigrant. It is evident from the employment contract that the Argentine Government, the Ministry of Marine acting as its agent, had advanced the necessary funds to the defendant; the terms of the Treaty place the obligation of reimbursement squarely on the defendant. The fact that the Convention signed at Buenos Aires on January 27, 1948, provides that as

a general rule the Argentine Government will assume the cost of transportation of immigrants and their families cannot be construed as modifying the legal relationship established between the plaintiff and the defendant prior to the second Treaty because the said Treaty does not provide for retroactive effect with regard to passage completed before this Treaty came into effect. . . .

“ It is argued that right of recovery of loans made by the Argentine Government arises under the 1947 and 1948 Conventions only if the immigrant has abandoned without cause within two years the employment or profession which he undertook as a pledge for admission to the country. This proposition appears to be founded on a misinterpretation of these Conventions. Both Treaties anticipate this eventuality as a cause of loss of immigrant status and of the rights and benefits attached thereto. The 1948 Convention includes, evidently as a sanction, the commitment of the immigrant to reimburse the Argentine Government for the cost of passage in certain circumstances; the 1947 Convention, which is the one applicable in this case, does not contain this clause because the cost of passage was entirely the responsibility of the immigrant.”

[Report: *Revista Jurídica Argentina La Ley*, 67 (July-September 1952), p. 130.]

Treaties—Operation of—Retroactive Operation of Arbitration Clause.

See Case No. 96 (*Ambatielos Case (Preliminary Objection)*).

Treaties—Operation of—Self-Executing Treaties—Charter of the United Nations—The Law of the United States of America.

See Case No. 53 (*Fujii v. State of California*).

Treaties—Operation of—Conflict between Treaties—Whether Obligations under a General Convention can be Reduced by a Subsequent Treaty between a Signatory and a Third State.

See Case No. 55 (*In re B.*).

Treaties—Operation of—Right of Individual to Sue Signatory State—Convention of Mannheim, 1868.

See Case No. 34 (*Boon and Chantiers Navals du Rupel v. State of the Netherlands*).

X.—Effect of Treaties on Third Parties

Treaties—Effect on Third Parties—Effect on Nationals of Third Parties—International Air Law.

See Case No. 101 (*Glenn v. Compania Cubana de Aviacion, S.A., et Al.*)

XI.—Termination of Treaties

i.—By Operation of Law

(a) IN GENERAL

Treaties—Extinction of—Agencies Competent to Determine Whether a Treaty has been Extinguished.

See Case No. 14 (*Landis & Gyr A.G. v. W. H. Goens & Co.*).

(c) OUTBREAK OF WAR

[See also PART XI, WAR AND NEUTRALITY.]

Treaties—Effect of Outbreak of War on—General Conventions—Effect of Appearance of New Government on Territory of Signatory State.

See Case No. 13 (*Gevato v. Deutsche Bank*).

XII.—Interpretation of Treaties

i.—Agencies of Interpretation

Case No. 105 Treaties—Interpretation of—Agencies of—International Law—Relation to Municipal Law—French Constitution of 1946.

In re BANOLAS.

France, Court of Appeal of Montpellier.
October 30, 1950.

THE FACTS.—This was an appeal by the Procureur de la République of Béziers against a decision of April 2, 1952, of the Tribunal correctionnel of Béziers to the effect that an automobile belonging to Banolas, a Spanish national, was exempt from requisition by the French military authorities. The Tribunal correctionnel held that the Franco-Spanish Convention of January 7, 1862, provided for such exemption; that this exemption could not be set aside by an inter-ministerial decree of January 28, 1910, which granted such exemption only to diplomatic and consular agents; and that this view was borne

out by Articles 26 and 28 of the French Constitution of October 1946, which provided that diplomatic treaties regularly notified and published have the force of law even if they are contrary to internal French laws. It was contended by the appellant that the French Government had concluded that the exemptions granted by the Convention did not relate to the requisition of horses or automobiles, and that the courts were bound by that interpretation.

Held: that the appeal must be allowed. The interpretation of a diplomatic act with respect to matters concerning public policy and international law was the function of the executive and not the judicial branch of the State. The Court said:

"The lower Court did not take into account the principle of the separation of powers. As was decided by the Supreme Court on March 8, 1913, it is the function of the courts to interpret the clauses of international treaties for the purpose of resolving private disputes, but it is the function of the Government to determine the meaning and import of that diplomatic act with respect to matters concerning public policy and international law. It was also pointed out in that decision that that rule applied particularly to questions of immunities granted to the nationals of contracting States in the matter of military requisitions and that, where the extent of one of these immunities depended on the interpretation of a diplomatic convention, the courts were bound by the official interpretation given by the Government.

"The French Government, interpreting various treaties concluded with foreign Powers, and in particular the Franco-Spanish Convention of January 7, 1862, containing provisions concerning military requisitions and exemptions therefrom in favour of nationals of the contracting parties, decided that these exemptions did not apply to the requisitions of horses and vehicles provided for by the Law of July 3, 1877, and that only diplomatic and consular agents enjoyed immunity from such requisitions. The Decree of 1910 was issued in conformity with that interpretation.

"The Court below was bound by the official interpretation of the Franco-Spanish Treaty given by the Government in respect of the military requisitions provided for by the Law of July 3, 1877, which also applies to the requisition of automobiles provided for in the Law of July 22, 1909, as shown by two letters addressed on June 12 and July 5, 1912, by the Minister for Foreign Affairs to the Minister of Justice.

"The Tribunal of Béziers invoked Articles 26 and 28 of the French Constitution of 1946. However, the rules laid down in those provisions cannot infringe the rule that the interpretation

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of international conventions, with regard to matters concerning public policy and international law, is exclusively the function of the Government. The Government has not, since the voting and publication of the new Constitution, shown an intention to modify the earlier interpretation of the Convention of 1862."

[Report: *Revue critique de droit international privé*, 42 (1953), p. 105.]

Case
No. 106

Treaties—Interpretation of—Agencies of—Ministry of Foreign Affairs—Interpretation Not Contested by Other Contracting Party—Acquiescence.

TETLOW *v.* ADMINISTRATION D'ENREGISTREMENT.

France, Tribunal Civil du Havre.
March 6, 1952.

THE FACTS.—This was an action to determine whether the plaintiff, a British national, was liable in France, where he was resident, to payment of the "*impôt de solidarité nationale*" established by Ordinance of August 15, 1945. The Franco-British Convention of February 28, 1882, provided that the nationals of the Contracting Parties should be exempt, on the territory of the other party, from all war contributions and extraordinary loans or contributions raised to meet situations of emergency. By a letter of September 19, 1946, addressed to the British Embassy in Paris, the French Ministry of Foreign Affairs stated that the "*impôt de solidarité nationale*" could not be regarded as a war contribution or extraordinary loan or contribution in the meaning of that treaty provision. The reason given for that interpretation was that the tax in question was not established for the exclusive benefit of French nationals, but was, like death duties, levied on all property actually or legally situate in France, whatever the nationality of its owners. The British Government, while making reservations as to the validity of that interpretation, stated that it would not contest it. It was now contended on behalf of the plaintiff that the "*impôt de solidarité nationale*" was an extraordinary contribution in the meaning of the Convention of 1882. The Administration d'Enregistrement, on the other hand, invoked the interpretation given by the Ministry of Foreign Affairs.

Held: that the Convention of February 28, 1882, was perfectly clear and not open to interpretation, and that Tetlow, a British subject, was thus not subject to the legislation concerning the "*impôt de solidarité nationale*" with regard to movable property. The Court said:

"Article 11 of the Convention of February 28, 1882, is perfectly clear, precise, and devoid of any ambiguity.

"The '*impôt de solidarité nationale*' is clearly an extraordinary and temporary contribution raised as a result of a situation of emergency. . . .

"The administration argues that Article 11 of the Convention has been officially interpreted by the Minister for Foreign Affairs, and that the Court is bound by that interpretation. There is no doubt that, in principle, in a case such as that before the Court, it is for the Government to interpret a treaty whose meaning and scope from the point of view of public international law must be determined; although such an interpretation is not binding on the other contracting party. Littre defines 'interpretation' as 'explaining an ambiguity or obscurity in a written document'; Larousse defines it as 'the explanation of an obscure decision'. Article 11 of the Convention is neither doubtful nor obscure. The Government has no power of interpretation where there is nothing to interpret; if it were otherwise, it could avoid the performance of a treaty by asserting that it said the contrary of what it was intended to say.

"It is irrelevant that the British Government—not without reservations—declared that it would not contest the point of view of the French Government. The Exchange of Notes in this matter is of no consequence in law. It does not constitute an addendum to the Convention. In their negotiations diplomats often base themselves on expediency and not law. The absence of protest does not amount even to tacit acquiescence. It appears from a discussion in the British Parliament on November 14, 1950, that Mr. Ernest Davies refrained from invoking the Convention of 1882 for reasons of diplomatic expediency. He added that it did not follow that there was an agreed interpretation, but that the contrary was true. And the British Ambassador, in his reply, expressed the hope that concessions would be made to British subjects, and suggested that the question of the '*impôt de solidarité nationale*' be placed on the agenda of the Co-ordination Committee in London."

[Report: *Revue critique de droit international privé*, 41 (1952), p. 291.]

ii.—Principles and Rules of Interpretation

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No. 107

Treaties—Interpretation of—*Traité-lois* and *traités-contrats*—Applicable Principles of Interpretation—"The Intention of the Parties"—Peace Treaty of Paris, 1947—Peace Treaty Imposed on Defeated State—Restrictive Interpretation of Provision Forming an Exception to Generally Accepted Principles of International Law—Implied Renunciation of Right of Expulsion of Aliens—Meaning of "Permitted to Reside"—The Conception of "Residence"—Interpretation by Reference to French Law.

Re RIZZO AND OTHERS.

Franco-Italian Conciliation Commission. June 25, 1952.
(Perier de Feral, Sorrentino, Bolla.)

THE FACTS.—Article 79 (1) of the Peace Treaty of Paris, 1947, provides as follows:

"1. Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property, rights and interests which on the coming into force of the present Treaty are within its territory and belong to Italy or to Italian nationals, and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Italy or Italian nationals, including debts, other than claims fully satisfied under other Articles of the present Treaty. All Italian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned."

Paragraph 6 of the same Article provides that the property covered by paragraph 1 shall not include, *inter alia*:

"(c) Property of natural persons who are Italian nationals permitted to reside within the territory of the country in which the property is located or to reside elsewhere in United Nations territory, other than Italian property which at any time during the war was subjected to measures not generally applicable to the property of Italian nationals resident in the same territory."

On November 29, 1947, France and Italy signed a convention under which France, in consideration of certain payments, agreed not to avail herself of Article 79 of the Treaty. Article 3 of the Convention provided, however, that "property, rights and interests within the territory of the Regency of Tunis and belonging to Italy or to Italian nationals shall be liquidated in accordance with Article 79". When France sought to liquidate property in Tunis belonging to certain Italian nationals, of whom Rizzo was one, Italy objected, on the ground that the property was exempted from liquidation by Article 79 (6) (c). The dispute was referred to the three

members of the Conciliation Commission as an arbitral tribunal (*collège arbitral*).

The French Ministry of Foreign Affairs, in a Note dated March 21, 1949, declared that only Italians who on September 15, 1947, held an ordinary *carte de séjour* valid for three years, could benefit under the exemption provided by Article 79 (6) (c) of the Treaty (and that only if the *carte* "had not been obtained irregularly"). The Italian Government now contended that the exemption applied whatever the length of the validity of the *carte*, and therefore it applied even to Italians who held only the *carte de séjour* of a temporary resident, which is good for one year only. Rizzo and a number of other Italians residing in Tunis held *cartes* of this kind. In reply, the French Government contended: (a) that the Treaty was a law-making treaty (*traité-loi*) and not a "*traité-contrat*": it was unilateral in character and the meaning and scope of the provision in question was to be found only in the intention of its draftsmen; (b) the word "reside" (in the expression "permitted to reside") implied a reference to the internal legislation of the State of residence, otherwise the Treaty itself would have given a definition of "residence"; (c) only those foreigners who, on the coming into force of the Treaty, held a *carte de résident temporaire* or a *carte de résident privilégié* could be regarded as persons "permitted to reside": holders of temporary permits could not be so regarded; (d) the Italian contention, if accepted, would mean that the idea of "residence" would be applicable to every Italian national who was physically present in Allied territory on September 15, 1947, so long as he had not entered irregularly.

Held: that the exemption of Article 79 (6) (c) applied to all Italian nationals who on September 15, 1947, held a *carte de résident* "*temporaire*", "*ordinaire*" or "*privilégié*".

I. *The Distinction between Law-Making and Other Treaties.* The Commission said:

"The distinction between *traités-lois* and *traités-contrats* seems to have been greatly discredited by the most recent writers on international law. Balladore-Pallieri (*Diritto internazionale pubblico* (1948), p. 61) goes so far as to claim that the doctrine has been universally abandoned.

"However that may be, writers who today still favour the distinction give the name *traité-contrat* to one which gives rise to particular, individual, juridical situations, special to the contracting States, and the name *traité-loi* to one which contains general principles which are the source of general, impersonal rights and obligations, either for all States or, at least, for an important number of them. (Cavaré, *Le Droit inter-*

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national public positif (1951), Vol. II, p. 45; *cf.* also Vol. I, p. 172. This writer gives as examples of *traités-lois* the Declaration of Paris, 1856, the Declaration of London, 1909, the Hague Conventions, the Covenant of the League of Nations and the Charter of the United Nations; "they constitute the expression, the source in the formal sense of international law, of international laws": *ibid.*, Vol. II, p. 46.)

"Assuming, then, that the distinction still exists, the Treaty of Peace of February 10, 1947, with Italy is not a *traité-loi*, because it has not as its object the laying down of general, impersonal rules; it is a *traité-contrat*, providing reciprocal rights and obligations between the Allied and Associated Powers on the one part and Italy on the other part. Moreover, it is at least arguable that there may be applied to *traités-lois* canons of interpretation different from those applicable to *traités-contrats*. The Institute of International Law, at its Bath meeting in September, 1950, applied itself to the question of the interpretation of treaties. It did not pass any resolutions on this subject, but in the draft which was presented by M. Lauterpacht, the Rapporteur, appeared, in Chapter 6, the following: 'There is no reason, in interpreting, to adopt different methods or principles according to whether law-making treaties or other kinds of treaties are in question' (*Annuaire* of the Institute of International Law, 1950, Vol. 1, p. 434). From the observations on M. Lauterpacht's Report, it appears that this point received the almost unanimous support of the members of the Second Commission (*op. cit.*, Vol. 1, pp. 435-436). It may be deduced from this that the dominant opinion among writers of public international law is today that which M. Lauterpacht summarized in his Report as follows (*op. cit.*, Vol. 1, p. 374): 'It is probable that, in that respect as in others, the better view is that, as regards interpretation, there is no difference in kind between the two classes of treaties (law-making or normative treaties and other treaties), supposing that they constitute two distinct classes. Both law-making and other treaties declare rules of law, that is to say, rules of conduct juridically binding on the parties.'

"The Treaty of Peace of February 10, 1947, cannot, moreover, be regarded as unilateral in character. International law does recognize unilateral acts, such as disputations (*contestations*), protests, notifications, declarations (Cavaré, *op. cit.*, Vol. II, pp. 36 and 37; Morelli, *Nozioni di diritto internazionale*, pp. 290 *et seq.*). But the Treaty, like all peace treaties, is a pact between States, an agreement concluded between political communities having internationally the status of States and as such acting as subjects of international law (Cavaré, *op. cit.*, Vol. II, p. 37). It is a typical example of a multilateral juridical

act between one State, Italy, on the one side, and several States, the Allied and Associated Powers, on the other side. The intention of the parties must therefore be the basic factor in the interpretation of the Treaty.

"The Treaty was not, indeed, negotiated. At the end of a victorious war, it was drawn up by the Allied and Associated Powers. No kind of negotiations, or bilateral discussion, with Italy was admitted. Only one indulgence was allowed to the representatives of Italy, that of setting out, in writing, their observations on the draft Treaty and of commenting verbally thereon, when invited, in the preliminary plenary sessions of the Conference of 'the Twenty-one' (Vedovato, *Il Trattato di Pace con l'Italia*, p. xvii). It is possible, in the interpretation of the Treaty, to draw conclusions from the effect which was given or not given to the observations so formulated by the representatives of the Italian Government. [Cf. the *Pertusola Claim*: see *International Law Reports*, 1951, Case No. 129.]

"But even in the case of a treaty of peace imposed on a defeated State without the latter having had the opportunity of making observations beforehand, the ascertaining of the intention of the parties, and not of one party only, remains the principal aim of interpretation. Although the defeated State gave its consent under constraint, it nevertheless gave it, and the agreement arises from that consent. It is true that the defeated State submitted itself to the will of the victorious States, but only to that will as it was manifested in the Treaty of Peace submitted for its signature. The victorious States cannot, therefore, require that the Treaty of Peace, although it was not negotiated, shall be interpreted according to their undisclosed wishes; it must be interpreted according to the will of the victorious States as they have expressed it (*exteriorisée*) and reduced it to writing (*concrétisée*), and as it appears objectively in the Treaty.

"The argument of the French Government can nevertheless be accepted to this extent, that, in a matter such as interpreting by reference to its objects the obligation imposed on a defeated State by a Treaty of Peace which was not negotiated, it is the object which is reasonably aimed at by victorious States that alone can and should be taken into account.

"Among the technical rules of construction of treaties is the maxim '*exceptio est strictissimae applicationis*.' Paragraph 6 (c) of Article 79 constitutes an exception to the general rule of the liquidation of Italian property laid down in paragraph 1 of the same Article. The maxim is only applicable in case of doubt, and, in this instance, it cannot prevail against the other traditional rule of interpretation that obligations contained in conventions must be interpreted in such a way as to impose

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the minimum burden on the debtor party (*Annuaire* of the Institute of International Law, 1950, pp. 402 and 433; Cavaré, *op. cit.*, Vol. II, p. 92).

"If paragraph 6 (c) forms an exception to paragraph 1 of Article 79, it only brings us back to the principle that properties of private individuals cannot be liquidated to satisfy claims against the State of which they are nationals. The Italian State, under paragraph 1 of Article 79, assumed an obligation which ran counter to that principle, and that obligation cannot be construed liberally. There is, moreover, no reason to make use of the rules of construction mentioned above except in the extreme case when every other means has failed to establish the intention of the parties (*Annuaire* of the Institute of International Law, 1950, Vol. 1, p. 433). Now, as we shall see in a moment, an interpreter [of the Treaty] would not be under such a necessity."

II. *The Interpretation of "permitted to reside".*—The Commission said: "The phrase 'permitted to reside' used in Article 79 (6) (c) of the Treaty, comports, in view of the expression 'permitted', a clear reference to the municipal legislation of the State of residence or alleged residence. A State can, in fact, permit a person to reside in its territory only by an administrative act under its own administrative law and by the authority recognized by that law as being sufficient for that purpose. The French Government is of the opinion that the verb 'reside' also implies a reference to the municipal legislation of the State of residence or alleged residence. If it were not so, the French Government considers that the Treaty would itself have given a definition of residence."

"This argument is open to several objections. It does not seem probable that the draftsmen of the Treaty intended to treat Italian national *A* who is in country *X* differently from Italian national *B* who is in country *Y*, both possessing property in country *Z*, merely because *A* is a resident of *X* under the terms of the municipal legislation of that country and *B* is not a resident of *Y* under the terms of the legislation of that country, although *A* and *B* are, in respect of *X* and *Y*, in identically the same factual situation as regards their living in those two countries. In the second place, it is difficult to see how the reference would work in a country where the municipal legislation knew nothing of the idea of residence, or where the legislation provided—as is the case in France—for several kinds of residence."

"Even if the argument of the French Government were conceded on this point, it would only displace the difficulty. The question would then arise, in effect, whether by the expression 'permitted to reside' the Treaty intended to refer

to provisional residence, ordinary residence or privileged residence, all three forms of residence being known to French law.

" It must therefore be admitted that the Treaty intended to base [the provision] on a conception of residence created, if not defined, by itself. It is for the interpreter to decide whether the situation in which an Italian national found himself on September 15, 1947, in [the territory of] one of the Allied and Associated Powers, with its permission, fulfilled the conditions of residence *ex jure conventionis*.

" As the Treaty of Peace does not define what is intended by ' residence ', it is permissible, for the purpose of interpretation, to deduce its meaning from the object which the Allied and Associated Powers set themselves in Article 79 (6) (c). They were of the opinion that the harsh liquidation measures provided by Article 79 were not justified against, in particular, Italian nationals who, at the date of coming into force of the Treaty, had been allowed to live habitually on the territory of one of the Allied and Associated Powers, and to maintain with the other inhabitants daily personal and economic relations such as ordinarily exist between persons living in the same country. Foreigners who normally live in a country form part, in some degree, of the population of that country and with their resources and activities contribute to its financial and economic potential. The authors of the Treaty judged that the existence on September 15, 1947, of such ties between the Italian national and the territory of one of the Allied and Associated Powers justifies a straining of the rule concerning the liquidation of property, provided that the ties in question were sanctioned by an administrative authorization. By that precaution, the Allied and Associated Powers protected themselves from the danger of favouring Italian subjects who ought to be regarded as undesirable on the territory of the United Nations by reason, for example, of their political attitude.

" The residence of which the Treaty speaks in Article 79 (6) (c) is not domicile, which the Treaty mentions expressly in other provisions (*e.g.*, Article 19 (1), Article 20 (1), paragraph 12 of Annex VI). Domicile is a juridical conception; residence is a general, material conception, or one of fact. The essence of domicile is the stable character of the [individual's] establishment. Residence does not require that stability; it is the relationship between a person and a territory during a temporary stay. That relationship cannot be simply one of physical presence; a passing through or a sojourn is not sufficient; the stay must have a habitual character, even if it is not continuous, together with an element of intent (*animus*), namely, the intention to remain (but not necessarily to establish one's self) in the place in question. It is, in fact, the

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concept of residence, such as it has been historically determined in jurisprudence, as a '*domicilium minus proprium*', which the authors of the Treaty appear to have had in view in Article 79 (6) (c)."

III. *Who can be Regarded as Persons "permitted to reside"?* —The Commission examined the provisions of the French *Ordonnance* of November 2, 1945, which governed the conditions of the admission, stay and residence in France of foreigners of various kinds, and the issue, term of validity, renewal, etc., of the various *cartes de résidence*, and continued: "The question before us comes to this: are the conditions on which, under French legislation, the grant of *cartes de séjour temporaire* depends, necessarily less rigorous than those which constitute residence in the sense of the Treaty?"

"What appears to be decisive in this regard is that the *carte de séjour temporaire* (Article 10 of the *Ordonnance*) is issued also to 'foreigners whom it does not appear to be opportune to authorize to stay as ordinary residents or privileged residents'. The *carte de résidence ordinaire* and the *carte de résidence privilégié* are thus not refused to such foreigners because their stay in France is not habitual in nature, nor because they have not the intention of remaining in France. The intentions of these foreigners, so far as concerns the character of their stay in France, is the same as that of ordinary residents and privileged residents; it is displayed, moreover, by identical manifestations as far as concerns presence on French territory. What varies is solely the character of the authorization which is given to them to sojourn in France, that authorization presenting to a considerable degree that 'permanent precariousness' which attaints all benefits accorded to residents, even the 'privileged' (Battifol, *Traité élémentaire de Droit international privé*, p. 175) and which is a corollary of the sovereignty of the State so far as concerns the admission of aliens to its territory and their establishment there.

"In the case of temporary residents, it is not the residence which is temporary because not habitual or not corresponding to an *animus manendi*: it is the permit which is temporary, because it is given for a period shorter than that for which it is given to ordinary residents and privileged residents. Temporary residents are residents as much as ordinary and privileged residents; they can acquire a civil domicile in France under the same condition (*Juris Classeur Civil*, Article 13); more generally, they enjoy the same civil rights if the latter are conditional on domicile or residence (except as regards marriage); finally, they have, under the same conditions, the opportunity of applying for reintegration into French nationality or naturalization as a French national (Circular

dated November 10, 1945, from the *Garde des Sceaux* to *Préfets*); but their residence is only permitted under conditions which are more precarious than those applicable to ordinary residents and, especially, to privileged residents.

"Now, the exception contained in Article 79 (6) (c) of the Treaty applies to all Italian nationals who are permitted to reside in a specified territory. The sub-paragraph does not distinguish between the grant of permission for a longer or for a shorter period, or on conditions giving them a greater or less guarantee of being able to stay on the territory in question. The Treaty is satisfied by some authorization to reside. The text being silent on the point, an interpreter cannot himself supply the idea of a restrictive condition relating to the duration of the permitted residence (*cf.* Niboyet in *Juris Classeur Périodique, La Semaine juridique*, June 28, 1951, No. 6328). When the French legislator wished to impose a restrictive condition of this kind, it was expressly set out, as, for example, in Article 2 of the Decree of February 2, 1950: 'Are excluded from the application of the preceding provisions, property, rights and interests of German nationals who, on January 1, 1946, had obtained from the competent authorities regular and permanent permission to reside . . . '."

IV. *The Position of Italian Nationals Physically Present in Allied Territory on September 15, 1947, without cartes de résidence.*—The Commission said: "Italian nationals who are on French territory on September 15, 1947, cannot in any event take advantage of Article 79 (6) (c) if they are merely in transit or staying for less than three months . . . [but] Italian nationals who on September 15, 1947, held a *carte* either *de résident temporaire* or *de résident privilégié* must be allowed the benefit of the sub-paragraph.

"But the *carte* must be fully effective on the date in question. It is for each Allied State to decide, by the application of its own legislation, whether it will accord the permission spoken of in Article 79 (6) (c) of the Treaty, or whether such permission, once given, will be withdrawn. The Allied State in question would withdraw it on the eve of the entry into force of the Treaty, and, in view of the wording of Article 79 (6) (c) of the Treaty, without thereby exposing itself to the reproach of wishing to evade that provision, seeing that the Treaty itself leaves it complete liberty in just that regard.

"Thus, Italian nationals, holders of a *carte de résidence*, against whom an expulsion order was made before September 15, 1947, cannot benefit under Article 79 (6) (c). It matters not if the order was not notified to the person in question until after September 15, 1947. It is true that French legislation requires notification and that the time for appeal by the

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person expelled runs from notification (Article 25 of the *Ordonnance* of 1945 and Article 6 of the application decree of March 18, 1946). But we are not concerned with the relationship between Italian nationals and the French administration; we are concerned with an international law relationship. Under the Treaty, certain juridical effects flow from residence in French territory, if on September 15, 1947, it was authorized by the French Government. That authorization would no longer exist, as to its international effects, on the date in question, if the French Government had previously ordered expulsion, and that would be so even if the expulsion order had not yet become effective as regards the person concerned (Article 6 of the Decree of March 18, 1946). Exception must be made for the case in which objection, on the ground of illegality, to the expulsion order has been accepted, even after September 15, 1947, by the competent French authority (*cf.*, Battifol, *op cit.*, p. 179).

"It is similarly immaterial whether an expulsion order made before September 15, 1947, has or has not been executed, the French administration having, expressly or *de facto*, suspended it. Suspension of the execution of an order does not affect the order itself. The French administration could, for example, for humanitarian reasons suspend an expulsion order without prejudice to its rights derived from the fact that residence was no longer authorized on September 15, 1947. By the suspension, the French Government allows a person to remain, but does not authorize him to reside, on French territory. There can be no question of tacit renunciation of an administrative measure such as expulsion.

"If the expulsion order was made before September 15, 1947, under emergency procedure, it none the less comes within Article 79 (6) (c) of the Treaty, and an international tribunal cannot review the question whether there was or was not an emergency. Both as to the occasion of an expulsion order and its emergency character, the French administration exercises a discretionary power for which it does not have to account to the French administrative courts, still less, of course, to the French judicial tribunals (Battifol, *op cit.*, p. 179). An international tribunal must confine itself to establishing that expulsion has been ordered, under an emergency procedure which is laid down by French municipal law and the application of which is by that law entrusted to the discretionary power of the administration. Expulsion can, in French law, be revoked by a subsequent order (Article 23 of the Ordinance, and Battifol, *op cit.*, p. 179). In that case, the expulsion order becomes a nullity *ex tunc*; the administration admits that the order was not well founded when it was made, and cannot

take advantage of rights acquired by an expulsion order which it admits was not justified. Such a case cannot be treated differently from a case in which the expulsion order, appealed against for illegality, has been cancelled by the competent French authority.

“Cancellation of permission to reside must be regarded in the same way as withdrawal, provided that it was ordered by the competent authority and in compliance with the provisions of the municipal law.”

[Report: *Recueil des Décisions*, Part 4, p. 82.]

NOTE.—The French member of the Commission appended a Note of reservation on the subject of the theory of interpretation of the Treaty.

Treaties—Interpretation of—Rules of—Inapplicability of Rule of Construction of Municipal Legislation. **Case No. 108**

THE *VREDEBURG* v. THE *SARINA DORINA*

Holland, District Court of Rotterdam.

December 17, 1952.

THE FACTS.—See *supra*, Case No. 35.

Article 2 of the Netherlands Judicature Act provides that “the Judiciary has an exclusive right to take cognizance of, and to adjudicate upon, all disputes concerning property or rights emanating therefrom, concerning debts or civil rights . . .”. This Article is generally interpreted as making the jurisdiction of a court dependent upon the subject of the dispute, as determined by the nature of the underlying legal relationship as presented by the plaintiff and not as it may exist in reality. Under this construction the plaintiff contended that he could give the Dutch Court jurisdiction by simply presenting his case as one of improper execution of a contract.

Held: that this contention must fail. The Court examined the question whether the traditional interpretation of Article 2 would still be tenable if it were to lead to a result contrary to the true sense of a provision of the Convention of Mannheim, 1868, and said: “Since the provision is a rule of public international law capable of direct application by a Netherlands court, the latter must be able, in a case submitted to its decision, to construe the rule as it thinks right in the general context of the Convention. Since the Convention, as an Agreement between States, has a wider range of operation than legislation in the national sphere of one of them, a national court cannot, when interpreting a rule of public international

**Case
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law such as Article 34 (II) (c) of the Convention, subordinate the latter to the traditional construction, however generally accepted, of a municipal legal provision such as Article 2 of the Judicature Act. That construction relates to cases in which a conflict of jurisdiction between two national judicial bodies is involved; it has no bearing upon cases in which there is a conflict of jurisdiction between a municipal court as such and a court acting under international law. The traditional interpretation of Article 2 of the Dutch Law must, therefore, give way to a correct construction of Article 34 (II) (c) of the Convention of Mannheim. No plaintiff, therefore, can be allowed, under cover of a particular interpretation of a rule of national law, to dress up an action in such a way as to remove it from the jurisdiction of the Rhine Navigation Courts to which it belongs under a rule of international law."

[Unreported.]

Treaties—Interpretation of—Various Rules of—Relevance of Texts *in pari materiae*—Presumption against Superfluity of Terms Used—Interpretation in Accordance with Accompanying Circumstances—Relevance of Interpretation Relied upon before National Legislature.

See Case No. 114 (*Anglo-Iranian Oil Co. Case (Preliminary Objection)*).

Treaties—Interpretation of—Principle of Effectiveness—Arbitration Clauses.

See Case No. 96 (*Ambatielos Case (Preliminary Objection)*).

Treaties—Interpretation of—Rules of—Principle of Effectiveness—Intention of Parties—Relative Weight in Interpretation.

See Case No. 57 (*Kozuh v. Uff. Stato Civile di Milano*).

Treaties—Interpretation of—Liberal Interpretation.

See Case No. 92 (*In re Arbulich's Estate*).

Treaties—Interpretation of—Rules of—Reasonable Construction—Exclusion of Provisions of Municipal Law.

See Case No. 108 (*The Vredeburg v. The Sarina Dorina*).

iv.—Consideration of Preparatory Work

Treaties—Interpretation of—Preparatory Work—Relevance of Interpretation Relied upon Before National Legislature.

See Case No. 114 (*Anglo-Iranian Oil Co. Case (Preliminary Objection)*).

Treaties—Interpretation of—Preparatory Work—Debate on Parliamentary Approval of Treaty—Rejection of.

See Case No. 108 (*The Vredeburg v. The Sarina Dorina*).

Treaties—Interpretation of—Reference to Preparatory Work.

See Case No. 102 (*Boileau v. Mélard and Wyckmans*).

v.—Miscellaneous

Treaties—Interpretation of—Most-Favoured-Nation Clause.

See Case No. 51 (*Case Concerning Rights of Nationals of the United States of America in Morocco*).

PART IX

INTERNATIONAL ORGANIZATION AND ADMINISTRATION

B—THE UNITED NATIONS

I.—Legal Nature of the United Nations. Membership

Case No. 109 **International Organizations—Legal Personality of—United Nations and United Nations Relief and Rehabilitation Administration—Succession in International Organization.**

UNITED NATIONS *v.* B.

Belgium, Tribunal Civil of Brussels.
March 27, 1952.

THE FACTS.—The defendant had formerly been an official of U.N.R.R.A., and had resigned on grounds of health. By error he was still paid salary to the amount of £1,180 10s. od. after he had left the service. The United Nations now brought an action to recover that sum. It was contended on behalf of the defendant, first, that both U.N.R.R.A. and the United Nations lacked legal personality, and, secondly, that the United Nations had not succeeded to the rights of U.N.R.R.A.

Held: that the sum of £1,180 10s. od. must be repaid. U.N.R.R.A. and the United Nations enjoyed legal personality in Belgium, and the United Nations had succeeded to the rights of U.N.R.R.A. The Court said:

“The organizations concerned are public establishments founded by States. The Washington Agreement setting up U.N.R.R.A. was ratified by a Belgian Law of August 3, 1944. The United Nations was set up by the Charter of the United Nations, an international convention which was signed at San Francisco on June 26, 1945, and ratified in Belgium by a Law of December 14, 1945. Since these public international establishments have been recognized by Belgian law, they have legal personality in Belgium.

“It appears from documents submitted to the Court that U.N.R.R.A. has been dissolved and that its rights against the defendant have been taken over by the United Nations. The defendant wrongly relies on the argument that the formalities provided for in Article 1690 of the Civil Code for the cession

of rights have not been observed; the principle *locus regit actum* must be applied. The Agreement between U.N.R.R.A. and the United Nations provides that the transfer of rights is made to the United Nations in favour of an organism called the United Nations International Children's Emergency Fund. The latter is thus the beneficiary of the sums to be recovered, but it is to the United Nations that the rights are directly ceded."

[Report: *Pasicrisie belge* (1953), III, p. 65.]

IV.—Other Organs of the United Nations

**International Organization—United Nations—International Case
Children's Emergency Fund—Officials of—Contracts of— No. 11
Termination—Obligation to Find Alternative Post.**

MORROW *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations.
August 11, 1952.

THE FACTS.—The complainant, a former U.N.R.R.A. official, having applied for employment with the United Nations, was engaged in December 1947 and attached to the Field Service of the International Children's Emergency Fund. He served in Italy, and was appointed on March 15, 1951, acting Head of the I.C.E.F. mission to Italy, while continuing his former duties as supply officer. On June 9, 1951, the complainant was informed that, with a view to a reduction of staff, the mission to Italy was to be combined with the mission in Greece. As the Head of the latter mission was to take charge of this combined mission, the Fund could no longer retain the applicant in his post in Italy. On September 19, 1951, the complainant was notified by the Head of Administrative Services of the Fund that his appointment was to be terminated with effect from October 20, 1951. In reply to the complainant's query, it was stated that owing to the reduction of staff resulting from the amalgamation of the missions in Italy and Greece, he was redundant. The Internal Appeals Board of the European Office of the United Nations, to which the complainant had appealed, found that sufficient efforts had not been made to find another post for the complainant before deciding to terminate his appointment on the grounds of reduction of staff. The Secretary-General of the United Nations thereafter informed the complainant that the I.C.E.F. had reconsidered the possibility of finding him a post, but without success, and that the termination of his contract must

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stand. This is the decision appealed against. The complainant claimed that the decision violated the Staff Rules in that efforts to find alternative employment had been confined to the I.C.E.F. Italian mission, and that vacancies in other services of the United Nations had not been reviewed before terminating his contract on grounds of reduction of staff. This meant, in effect, that proof of actual reduction of staff within the total establishment of the United Nations Secretariat had not been established and that, consequently, the alleged grounds for termination did not exist. The Secretary-General asserted, first, that the complainant was selected in view of his special aptitude for a particular task, that the letter of appointment stipulated that he was attached to the I.C.E.F. mission to Italy, that he accepted the terms of his contract and that, his post in Italy having been abolished, the Fund was under no obligation, according to the terms of the contract, to endeavour to place him elsewhere. The Secretary-General further maintained that under the Staff Rules the complainant had no legal right to consideration for a post elsewhere than in Italy, and that the official appointed as Head of Mission was better qualified than the complainant. The latter pointed out that since his successor was not a supply officer, this argument was irrelevant. The Secretary-General finally asserted that, although not legally required to do so, he had made serious endeavours to place the complainant elsewhere.

Held: (1) that the complainant's contract did not exclude the possibility of assigning him to a post elsewhere;

(2) that, under the Staff Rules, the Secretary-General was under an obligation to consider whether there was a suitable vacancy elsewhere before terminating the complainant's appointment;

(3) that the staff of the I.C.E.F., although serving in a department of the Secretariat having a special legal status and its own budget, was not employed by a body distinct from the United Nations, but formed part of the Secretariat staff;

(4) that, owing to misinterpretation of the Secretary-General's obligations, efforts were made to determine whether another post was available before terminating the complainant's contract, but that the scope of those efforts was too limited. Consequently, Staff Rule 104 had been violated in that the appointment had been terminated on grounds of reduction of staff, without sufficient examination of the possibilities of placing the complainant elsewhere; and, finally,

(5) that the complaint was well-founded and the complainant was entitled to compensation,

The Tribunal said: “. . . In his application for employment, addressed to the United Nations, [the complainant] placed no restriction on his duty station and agreed to travel frequently. . . . In accordance with regular practice of the United Nations, his letter of appointment specifies his duty station, namely, Mission to Rome, but contains nothing which would make his presence in Rome a condition of employment. Although his knowledge of Italy was certainly taken into account when he was engaged, the applicant does not on that account come within the category of locally recruited personnel. The Tribunal therefore considers that in the absence of any express provision, the applicant's contract did not exclude the possibility of a post elsewhere. Special knowledge of Italian conditions acquired during a sojourn of several years cannot be regarded, for a British official having acquired administrative experience in his own country, as limiting the rights deriving from a contract in conformity with those issued by the United Nations. . . . Now General Assembly Resolution 57 (I) establishing the International Children's Emergency Fund stipulates that:

‘ 4 (a) Staff facilities required for the administration of the Fund shall be provided to the Board by the Secretary-General.’

“ It follows that the staff of the Fund, although serving in a department of the Secretariat having a special legal status and its own budget, is not employed by a body distinct from the United Nations, but forms part of the Secretariat Staff. This principle was explicitly recognized by the Legal Department of the United Nations in a memorandum of January 17, 1952, concerning the legal status of the Fund. The memorandum states that all decisions concerning the Staff of the Fund must be taken in accordance with the Statute and with the Staff Rules and any special rule approved by the Secretary-General. . . . No restriction or limitation having been prescribed by a special provision, the Bureau of Personnel [of the United Nations] was required, before terminating the applicant's contract, to consider whether there was a suitable vacancy elsewhere, without confining itself to a specific geographic area. . . . [Here followed an analysis of the steps taken by the Secretary-General to find another post for the complainant. The Tribunal then continued:] . . . in these circumstances, the Tribunal notes that certain efforts were made to find the applicant a post. But owing to mis-interpretation of the [Secretary-General's] obligations, those efforts were made by a service which was ill-equipped to take effective action . . . there is no evidence to show that the United Nations Bureau of Personnel made the enquiries prescribed . . . or that it was

**Case
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Contd.**

exempted from that duty by a special provision approved by the Secretary-General. . . . For these reasons, the Tribunal considers that in spite of action taken, the applicant was terminated without due observance of Staff Rule 104. Since the applicant desires either the rescinding of the decision contested or an indemnity, the Tribunal, taking account of the uncertainty of re-employment, awards the applicant U.S. dollars 400 as compensation. . . ."

[Unreported.]

V.—Interpretation of the Charter of the United Nations

Charter of the United Nations—Interpretation of—Human Rights and Freedoms.

See Case No. 53 (*Fujii v. State of California*).

E—INTERNATIONAL OFFICIALS

**Case
No. 111**

International Organization—Officials of United Nations—Contracts of Employment—Termination of Right of Association of Officials—Universal Declaration of Human Rights—Obligations of the Secretary-General—Obligation to Give Reasons for Non-renewal of Contract.

ROBINSON *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations.
August 11, 1952.

THE FACTS.—The complainant served as an official of the United Nations from January 1950 to January 1952, on two successive one-year, fixed-term, appointments. At the time of his engagement, the complainant was known to the United Nations and the Administration took the initiative in offering him a contract. The Population Division of the United Nations, to which he was appointed, was understaffed. The special field of the complainant was a narrow one in which there were few candidates available. The report on his first year of service gave detailed recognition of his competence, work, production and character. The post occupied by him was an established one, and the complainant was aware of the very favourable opinion of him consistently held by his superior officers. The complainant claimed first that he was entitled to expect the renewal of his contract and that accordingly this would give him the right, under a previous ruling

of the Tribunal (see *Howrani et Al. v. Secretary-General: International Law Reports*, 1951, p. 452), to be acquainted with the reasons for the decision not to renew his contract. The Secretary-General denied that this ruling of the Tribunal was applicable. He stated that the engagement was for a specific period of one year, without any commitment as to the future; that the practice of fixed-term appointments was a common one in the administrative practice of the United Nations; and that, while the chiefs of the complainant proposed the extension of his appointment for two years, a contract for one year only was granted, a fact which constituted a warning to the complainant that the views of the Administration were not such as to lead him to believe that he was likely to be retained permanently. The complainant further contended that the decision of the Administration not to grant a further contract was based upon his activities in the Staff Association, Staff Council and the Staff Committee, and accordingly was contrary to the complainant's right of association. The complainant, from the beginning of his appointment, took considerable interest in the Staff Association and its work, became a member of the Staff Committee and was elected Vice-Chairman of the Committee. In that capacity, he took part in discussions on a number of issues on which there were substantial differences of opinion between the Administration and the representatives of the Staff Association. In addition, the complainant was chosen to represent the staff in a series of hearings before the Joint Appeals Board concerning the termination of employment of a number of staff members. It was inevitable that during those proceedings the complainant voiced opinions in conflict with those of the Administration. The complainant sought to establish that the decision not to offer him a new appointment was due to these Staff Association activities.

The Secretary-General alleged that the reason for the decision not to renew the complainant's contract was not the complainant's activities in the Staff Association. The Secretary-General did not deny the complainant's competence for his professional work, but alleged that the decision was "based entirely on consideration of suitability". In response to the Tribunal's questions on this point, the Secretary-General made two submissions. The first was that because of an "obligation of confidence" the Secretary-General did not consider that he should, on his own initiative, place before the Tribunal the relevant facts underlying the decision "in view of the confidential nature of certain of these facts". The second was that a statement of his reason on the Secretary-General's own initiative would imply an abandonment of his clear legal

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No. 111
Contd.

position relating to the non-renewal of contracts. The Secretary-General failed to state explicitly the grounds for his decision not to renew the complainant's contract.

Held: (1) *On the complainant's right to expect renewal of his contract:* that it was not necessary to make any pronouncement on this issue because the complainant submitted a further argument dealing with a major question of principle.

(2) *On the violation of the complainant's right of association:* that the complaint was well founded. The Tribunal said: ". . . The right of association is recognized by Articles 20 and 23 (4) of the Universal Declaration of Human Rights, adopted by the Third General Assembly. The Tribunal notes that the Secretary-General has taken steps to make known to the staff his clear views that the staff should be organized in an association with rights of representation to the Administration. The Tribunal is satisfied that the principle of the right of association to which the United Nations are solemnly pledged is admitted on all sides to be a principle which must prevail also inside the Organization's own Secretariat. The Secretary-General took a number of steps to implement this right . . . it is clear . . . that the right of association is recognized for the staff of the United Nations . . . it is an indispensable element of the right of association that no action should be taken against a member of the staff on the ground that he is or has been an officer or representative of the Staff Association or otherwise been active in the Association. . . . It is established that the applicant was an active member of the Staff Association . . . and that in those capacities he took part in discussions and representations in which he was opposed to the Administration on important and controversial issues. . . . The applicant seeks to prove by such indirect methods as are available to him, that the decision not to offer him a new appointment was due to these Staff Association activities." [The Tribunal then recalled the complainant's qualifications, his reasons for expecting the renewal of his appointment, and the reasons adduced on behalf of the Secretary-General for withholding the reasons for the non-renewal of the complainant's appointment. The Tribunal continued:] ". . . no action must be taken against a staff member because he has taken a certain position as an officer or representative of the Staff Association or because of his methods of expression or personal behaviour in that capacity. As has been recorded . . . the applicant had played a very active part in the work of the Staff Association, and above all, as a member of the Staff Committee. In the case of such a staff member, the non-renewal of his contract is bound to give rise to suggestions

as to the denial of the right of association. In a situation of this kind, it will normally not be possible for the staff member to produce positive evidence that the reasons for the non-renewal of his contract was his Staff Association activities. The most that he can do, is to bring evidence to the effect that certain other reasons have not been the cause of the decision, as has been done in this case, that the record of performance of professional functions is satisfactory and that the reports of superior officers are in his favour. If, therefore, his contractual right of association is to be effectively protected, it must be recognized as inherent in that right that the Administration should provide the reason for the non-renewal of his contract. In view of the applicant's Staff Association activities, the Tribunal finds that this applies to his case and that the Administration accordingly should have given the reason for its decision not to renew the applicant's appointment. A general reference by the respondent to the applicant's 'suitability' cannot be considered a sufficiently specific reason. The respondent's refusal to state his reason, because of his view that this would imply an abandonment of his legal position relating to the non-renewal of contracts, is not well founded. It is normal in legal proceedings for each party to produce arguments and evidence which can be subject to test by the other side in all matters, including arguments of the opposite party, which become relevant only if the Tribunal finds against the first party on some primary issue. In the event of one party failing to comply with this procedural practice, it must clearly be at his own risk. . . . It must clearly be for the Secretary-General to decide what information and evidence he places before the Tribunal which can be subject to test and counter argument by the applicant. When respondent does not, of his own initiative, produce such information and evidence, despite a number of requests by the Tribunal that a clear statement should be made, the Tribunal is left with no option but to proceed to a conclusion in the absence of such information and evidence. The applicant cannot be penalized because certain information is regarded by the respondent as confidential and the applicant has no opportunity either of knowing what the reason is or of challenging it. Otherwise in a case of this kind there would be no effective protection of the right of association inherent in the contractual relationship of the applicant and the United Nations in accordance with the terms of appointment. The Tribunal finds, therefore, that the failure to adduce a reason for non-renewal in this case entitles him to relief."

[The Tribunal then addressed itself to further violations of due process complained of in connection with the procedure

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Contd.

followed by the Administration in deciding not to renew the complainant's contract, and dismissed them because of the ruling already given or because they appeared to be without substance. On the measure of relief to be afforded to the complainant, the Tribunal said:] “. . . The applicant in the course of proceedings indicated that he no longer desired the Tribunal to order the rescinding of the decision contested but, pursuant to Article 9 of the Tribunal's Statute, requested that compensation for the injury sustained be fixed by the Tribunal. . . . The Tribunal awards an amount corresponding to salary and allowances from the date of expiration of the contract to the date of the Tribunal's decision . . . in view of the high qualities possessed by the applicant, the shortage of persons of his knowledge and experience, the Tribunal feels that the amount of compensation for lack of earnings should be related only to providing him with an opportunity of returning to his country of origin and securing a new appointment. It accordingly awards the sum of \$ 2,000.”

[Unreported.]

**Case
No. 112**

**International Organization—Officials of United Nations—
Contracts of Employment—Fixed-term Contracts—Termination of—Discretion of Organization in the Matter of Renewal
of Contracts.**

DE POJIDAEFF *v.* SECRETARY-GENERAL OF THE UNITED
NATIONS.

Administrative Tribunal of the United Nations.
December 16, 1952.

THE FACTS.—The complainant served in the United Nations Secretariat, from April 1948 on, as an English-language translator and later as a Translator/Précis-writer, on several fixed-term appointments, the last of which was due to expire on October 2, 1951. On October 1, 1951, the Bureau of Personnel advised the complainant that his contract was extended for two months and that his services would no longer be required after December 3, 1951. After an unsuccessful appeal to the Joint Appeals Board the decision was confirmed, and appealed against before the Tribunal. The complainant contended that, although he held a fixed-term appointment, he enjoyed reasonable expectancy of continued employment because he occupied an established post, performed work of a continuous nature and had been recommended for promotion and the award of a permanent contract. The complainant further contended that if his last report contained an unfavourable evaluation of his services, it was because of his alleged attitude when he

was assigned to proceed to Korea at the end of 1950. Furthermore, he contended, damaging evaluations, which had no foundation in fact, had been wrongfully inserted in the report and conclusions were drawn by the Administration without observance of due process. Finally, the complainant had no exact knowledge of the charges made against him, nor did he have the opportunity to present any explanation before the decision to terminate his appointment was taken. The complainant claimed (a) reinstatement, (b) deletion of the relevant statements in his periodic report, (c) correction of his rating and classification, and (d) damages for defamatory statements.

The Secretary-General asserted: (a) that the decision contested merely consisted in the expiry of a fixed-term contract; (b) that the complainant did not acquire any reasonable expectancy of continued employment with the United Nations; and (c) that all of the complainant's superiors were unanimous in their appraisal of his attitude; and, finally, that the complainant enjoyed all the guarantees provided for in the Staff Rules.

Held: that the Secretary-General's submission that from a legal point of view the appeal was not well founded, because the complainant's employment had ceased in accordance with the terms of a fixed-term appointment, must be rejected. The Tribunal said: ". . . to accept any such proposition would be to accept a general thesis that no holder of a fixed-term appointment can ever be regarded as having a justifiable right to state a case to the Tribunal."

Nevertheless, the complaint was not well-founded, and must be dismissed. In view of his last periodic report, the complainant had no expectancy of further employment. The complainant had knowledge of the contents of his periodic reports, which he signed, and he expressed his views thereon to his superiors, both in writing and orally. The Tribunal was not competent to pass upon the Administration's evaluation of an official's competence, but merely on the observance of prescribed procedures. The Tribunal said: "It is not for the Tribunal to analyse or comment upon motives which may have led to the decision of the Administration. The Tribunal's task is to ascertain whether the procedures set down have been observed correctly. In this case, it is clear that all procedures have been correctly observed."

Nor was the Tribunal competent to deal with the alleged deficiencies of internal administrative procedures. For example, the request for the deletion from the complainant's report of certain statements and the changing of the rating and classification shown in the report, was a purely administrative

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Contd.**

matter, appropriate for internal action within the Secretariat. Again, it would not be appropriate for the Tribunal to intervene in administrative matters as to the method and manner of presentation of periodic reports. The Tribunal said: "All methods of annual report upon staff are difficult both in conception and in application. But such markings serve a double purpose. Firstly, they enable the essential appraisal of efficiency to be reached, secondly, they afford the staff the opportunity of knowing critical comments made about them, with a view both to offering their observations thereon and to correcting any lack of efficiency. The Tribunal, therefore, would at any time be cautious about passing any comment which discouraged the development of the best possible annual reporting system."

With respect to damages, the Tribunal would give judgment with regard to non-observance of contracts of employment or of terms of appointment, but in the absence of non-observance the Tribunal would award no damages.

[Unreported.]

F—MISCELLANEOUS

International Organization—Miscellaneous—Succession from One International Organization to Another.

See Case No. 109 (*United Nations v. B.*).

United Nations—Immunities of—Delegates to the United Nations—Wife of Delegate.

See Case No. 89 (*People v. von Otter*).

PART X

DISPUTES

B—INTERNATIONAL COURT OF JUSTICE

II.—Contentious Jurisdiction

i.—Competence

International Court of Justice—Interim Measures of Protection—Article 41 of the Statute—Interim Measures of Protection and Jurisdiction of the Court on the Merits. **Case No. 113**

ANGLO-IRANIAN OIL CO. CASE.
(*United Kingdom v. Iran*).

(Request for Indication of Interim Measures of Protection)

International Court of Justice.

(Basdevant, President; Guerrero, Vice-President; Alvarez, Hackworth, Winiarski, Zoričić, De Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Read, Hsu Mo, Judges.)

Order of July 5, 1951.

THE FACTS.—On May 26, 1951, the Government of the United Kingdom instituted against the Iranian Empire proceedings in the matter of the Anglo-Iranian Oil Co. On June 22, 1951, the Government of the United Kingdom, in reliance on Article 41 of the Statute of the Court, requested the Court to indicate that, pending the final Judgment of the Court in the *Anglo-Iranian Oil Company* case:

“(a) The Imperial Government of Iran should permit the Anglo-Iranian Oil Company, Limited, its servants and agents, to search for and extract petroleum and to transport, refine or treat in any other manner and render suitable for commerce and to sell or export the petroleum obtained by it, and generally, to continue to carry on the operations which it was carrying on prior to May 1, 1951, free from interference calculated to impede or endanger the operations of the Company, by the Imperial Government of Iran, their servants or agents, or any Board, Commission, Committee, or other body nominated by them.

“(b) The Imperial Government of Iran should not by any executive or legislative act or judicial process hinder or prevent or attempt to hinder or prevent the Anglo-Iranian Oil Company, Limited, its servants or agents, in or from continuing to carry on its operations as aforesaid.

“(c) The Imperial Government of Iran should not by any executive or legislative act or judicial process sequester or seize or attempt to sequester or seize or otherwise interfere with any

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property of the Anglo-Iranian Oil Company, Limited, including (but without prejudice to a decision on the merits of the case) any property which the Imperial Government of Iran have already purported to nationalize or otherwise to expropriate.

“(d) The Imperial Government of Iran should not by any executive or legislative act or judicial process sequester or seize or attempt to sequester or seize any monies earned by the Anglo-Iranian Oil Company, Limited, or otherwise in the possession or power of the Anglo-Iranian Oil Company, Limited, including (but without prejudice to a decision on the merits of the case) any monies which the Imperial Government of Iran have purported to nationalize or otherwise to expropriate or any monies earned by means of property which they have purported so to nationalize, or otherwise to expropriate.

“(e) The Imperial Government of Iran should not by any executive or legislative act or judicial process require or attempt to require the Anglo-Iranian Oil Company, Limited, to dispose of the monies referred to in sub-paragraph (d) above otherwise than in accordance with the terms of the Convention of 1933 or of any measure to be indicated by the Court.

“(f) The Imperial Government of Iran should ensure that no other steps of any kind are taken capable of prejudicing the right of the Government of the United Kingdom to have a decision of the Court in its favour on the merits of the case executed, should the Court render such a decision.

“(g) The Imperial Government of Iran and the Government of the United Kingdom should ensure that no step of any kind is taken capable of aggravating or extending the dispute submitted to the Court, and in particular, the Imperial Government of Iran should abstain from all propaganda calculated to inflame opinion in Iran against the Anglo-Iranian Oil Company, Limited, and the United Kingdom.”

On June 23 the President of the Court transmitted by telegraph a message to the Prime Minister and the Minister for Foreign Affairs in Iran a message in the following terms:

“Court being due to meet to consider Request for indication interim measures of protection filed June 22 by United Kingdom Agent, it is my duty, in accordance with Article 61 of the Rules, to take such measures as appear necessary to me to enable the Court to give an effective decision. For this purpose I have honour suggest to Your Excellencies that Imperial Government issue appropriate instructions to avoid all measures which might render impossible or difficult the execution of any judgment which the Court might subsequently give and to ensure that no action is taken which might aggravate the dispute submitted to Court. Any measures taken by Imperial Iranian Government for this purpose would in no way prejudice such representations as that Government may deem it appropriate to make to Court either in proceedings on Request for interim measures in which both Parties will have right to be

heard at hearing on June 30 or subsequently in proceedings on Application filed May 26 by the United Kingdom."

In a message subsequently sent by the Government of Iran, it was stated as follows:

"In view of the foregoing considerations the Iranian Government hopes that the Court will declare that the case is not within its jurisdiction because of the legal incompetence of the complainant and because of the fact that exercise of the right of sovereignty is not subject to complaint. Under these circumstances the request for interim measures of protection would naturally be rejected."

A public hearing of the Court was held on June 30, 1951. The Iranian Government was not represented at this hearing.

On July 5, 1951, the Court indicated interim measures of protection in the following terms:

"Whereas in its message of June 29, 1951, the Iranian Government stated that it rejected the Request for the indication of interim measures of protection presented by the United Kingdom Government on the grounds principally of the want of competence on the part of the United Kingdom Government to refer to the Court a dispute which had arisen between the Iranian Government and the Anglo-Iranian Oil Company, Limited, and of the fact that this dispute pertaining to the exercise of the sovereign rights of Iran was exclusively within the national jurisdiction of that State and thus not subject to the methods of settlement specified in the Charter;

"Whereas it appears from the Application by which the Government of the United Kingdom instituted proceedings, that that Government has adopted the cause of a British company and is proceeding in virtue of the right of diplomatic protection;

"Whereas the complaint made in the Application is one of an alleged violation of international law by the breach of the agreement for a concession of April 29, 1933, and by a denial of justice which, according to the Government of the United Kingdom, would follow from the refusal of the Iranian Government to accept arbitration in accordance with that agreement, and whereas it cannot be accepted *a priori* that a claim based on such a complaint falls completely outside the scope of international jurisdiction;

"Whereas the considerations stated in the preceding paragraph suffice to empower the Court to entertain the Request for interim measures of protection;

"Whereas the indication of such measures in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the Respondent to submit arguments against such jurisdiction;

"Whereas the object of interim measures of protection

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provided for in the Statute is to preserve the respective rights of the Parties pending the decision of the Court, and whereas from the general terms of Article 41 of the Statute and from the power recognized by Article 61, paragraph 6, of the Rules of Court, to indicate interim measures of protection *proprio motu*, it follows that the Court must be concerned to preserve by such measures the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent;

“ Whereas the existing state of affairs justifies the indication of interim measures of protection;

“ For these reasons,

“ THE COURT

“ Indicates, pending its final decision in the proceedings instituted on May 26, 1951, by the Government of the United Kingdom of Great Britain and Northern Ireland against the Imperial Government of Iran, the following provisional measures which will apply on the basis of reciprocal observance:

“ 1. That the Iranian Government and the United Kingdom Government should each ensure that no action is taken which might prejudice the rights of the other Party in respect of the carrying out of any decision on the merits which the Court may subsequently render;

“ 2. That the Iranian Government and the United Kingdom Government should each ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court;

“ 3. That the Iranian Government and the United Kingdom Government should each ensure that no measure of any kind should be taken designed to hinder the carrying on of the industrial and commercial operations of the Anglo-Iranian Oil Company, Limited, as they were carried on prior to May 1, 1951;

“ 4. That the Company's operations in Iran should continue under the direction of its management as it was constituted prior to May 1, 1951, subject to such modifications as may be brought about by agreement with the Board of Supervision referred to in paragraph 5;

“ 5. That, in order to ensure the full effect of the preceding provisions, which in any case retain their own authority, there should be established by agreement between the Iranian Government and the United Kingdom Government a Board to be known as the Board of Supervision composed of two Members appointed by each of the said Governments and a fifth Member, who should be a national of a third State and should be chosen by agreement between these Governments, or, in default of such agreement, and upon the joint request of the Parties, by the President of the Court.

"The Board will have the duty of ensuring that the Company's operations are carried on in accordance with the provisions above set forth. It will, *inter alia*, have the duty of auditing the revenue and expenses and of ensuring that all revenue in excess of the sums required to be paid in the course of the normal carrying on of the operations and the other normal expenses incurred by the Anglo-Iranian Oil Company, Limited, are paid into accounts at banks to be selected by the Board on the undertaking of such banks not to dispose of such funds except in accordance with the decisions of the Court or the agreement of the Parties."

[Report: *I.C.J. Reports*, 1951, p. 89.]

Judges Winiarski and Badawi Pasha delivered a Dissenting Opinion in the following terms:

"However justified the interim measures of protection formulated in this Order may appear, we are of opinion that the Court should not have indicated them, on grounds of principle which it is our duty to indicate briefly.

"The question of interim measures of protection is linked, for the Court, with the question of jurisdiction; the Court has power to indicate such measures only if it holds, should it be only provisionally, that it is competent to hear the case on its merits. Article 41 of the Statute empowers the Court to indicate interim measures of protection 'if it considers that circumstances so require'. The provisions of this Article presuppose the competence of the Court; this Article is to be found in the Chapter of the Statute headed 'Procedure', it refers to 'the parties': there must therefore be proceedings within the meaning of the Statute and there must be parties.

"Clearly, it could not be claimed that, in the event of a challenge of its jurisdiction, the Court should finally pronounce on this question before indicating interim measures of protection; in such a case as this the request might well become pointless; but the Court must consider its competence reasonably probable.

"Article 41 naturally raises a different question for the consideration of the Court, the question whether the circumstances require provisional measures to be taken, and, from this point of view, the power of the International Court of Justice is not in substance different from that of a national tribunal. President Anzilotti, in a dissenting opinion (in the Polish Agrarian Reform case, in 1933) went so far as to say that if the *summaria cognitio*, which was characteristic of a procedure of that kind, enabled the Court to take into account the possibility of the right claimed and the possibility of the danger to which that right was exposed, a request for interim measures of protection should be granted. But as interim measures of protection are exceptional in character and in derogation of general rights, the tribunal ought to examine the situation as a whole; thus, for instance, in the countries where there is power to grant a temporary injunction, in cases where the measures asked for would involve particular hardship on the respondent, a judge will only grant it if the right of the applicant appears to him to be clear; thus, too, if it seems to him to be very probable that the applicant will fail in the proceedings, he will refuse to grant the relief asked for. The question of the jurisdiction of the national tribunal does not in practice arise; the application is made to the competent tribunal; if the tribunal

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has no jurisdiction it will not order interim measures. But, in municipal law, there is always some tribunal which has jurisdiction.

" In international law it is the consent of the parties which confers jurisdiction on the Court; the Court has jurisdiction only in so far as that jurisdiction has been accepted by the parties. The power given to the Court by Article 41 is not unconditional; it is given for the purposes of the proceedings and is limited to those proceedings. If there is no jurisdiction as to the merits, there can be no jurisdiction to indicate interim measures of protection. Measures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State. For this reason, too, the Court ought not to indicate interim measures of protection unless its competence, in the event of this being challenged, appears to the Court to be nevertheless reasonably probable. Its opinion on this point should be reached after a summary consideration; it can only be provisional and cannot prejudice its final decision, after the detailed consideration to which the Court will proceed in the course of adjudicating on the question in conformity with all the Rules laid down for its procedure.

" We find it difficult to accept the view that if *prima facie* the total lack of jurisdiction of the Court is not patent, that is, if there is a possibility, however remote, that the Court may be competent, then it may indicate interim measures of protection. This approach, which also involves an element of judgment, and which does not reserve to any greater extent the right of the Court to give a final decision as to its jurisdiction, appears however to be based on a presumption in favour of the competence of the Court which is not in consonance with the principles of international law. In order to accord with these principles, the position should be reversed: if there exist weighty arguments in favour of the challenged jurisdiction, the Court may indicate interim measures of protection; if there exist serious doubts or weighty arguments against this jurisdiction such measures cannot be indicated.

" In order to minimize the seriousness of this question, there have been invoked before the Court examples taken from the practice of the Mixed Arbitral Tribunals. But these tribunals, as joint organs of two States, differ both as to their character and as to their procedure from an international tribunal, and, therefore, from the International Court of Justice, and there is, consequently, nothing to be learned from their precedents.

" There were also invoked precedents of the Permanent Court of International Justice; these precedents, however, in no way support the argument put forward. Interim measures of protection were requested in six cases; the requests were granted in only two. In the Belgian-Chinese case (in 1927), the President first refused, then granted, and, finally, revoked the interim measures of protection. In his Order, the President was careful to say: ' Provisionally, pending the final decision of the Court . . . either on the question of its jurisdiction or on the merits.' In revoking these measures the President pointed out what were the circumstances: ' the time-limit allowed for the filing of the Counter-Case has not expired, the Respondent has not had an opportunity of indicating whether he accepts the Court's jurisdiction in the case.' In the case concerning the Electricity Company of Sofia and Bulgaria (in 1939), Bulgaria objected to the jurisdiction of the Court. The objection was considered by the Court and allowed in part; as to the remainder, the Court held itself competent. It was only after this finding that the Court indicated interim measures of protection, and then in very general terms.

" There are certainly cases in which the objection to the jurisdiction is regarded as a mere ground of defence, and in which the party overruled in its objection continues to take part in the proceedings. But in this case the facts are quite different. Iran affirms that it has not accepted the jurisdiction of the Court in the present matter and that it is in no way bound in law; it has refused to appear before the Court and has put forward reasons for its attitude. The Court ought therefore to decide, in a summary way and provisionally, for the purpose of arriving at the decision which it must take on the question of interim measures of protection, which is the more probable of the two conclusions which it may finally come to on the question of its jurisdiction.

In this connection, a consideration, entirely summary in character, of the various grounds upon which the Government of the United Kingdom alleges that the Court has jurisdiction, leads us to the provisional conclusion that if Iran does not accept the jurisdiction of the Court in pursuance of the suggestion made by the United Kingdom in paragraph 20 of the Application (' Alternatively, whether or not the Court has the right to exercise jurisdiction in this case . . . the Government of the United Kingdom expects that Iran . . . will agree to appear before the Court voluntarily '), the Court will at the time of its final decision be compelled to hold itself without jurisdiction in this case and that, in these circumstances, interim measures of protection should not have been indicated."

**International Court of Justice—Contentious Procedure—Case
Jurisdiction—Declaration under Optional Clause of Article No. 114
36 of the Statute—Reservations—Interpretation of—Reserva-
tion of Treaties Posterior to Ratification of this Declaration—
Meaning of—Interpretation by reference to Similar Declara-
tions—Interpretation in Accordance with Presumption
against Superfluity of Terms Used—Interpretation in the
Light of Historic Circumstances Accompanying the Declara-
tion—Relevance of Interpretation Adduced before National
Legislature—Relevance of Most-Favoured-Nation Clause in
Relation to Operation of Declaration under Optional Clause
—Concessionary Contract between Government and Com-
pany—Whether Partaking of the Nature of a Treaty—*Forum
prorogatum*—Provisional Measures of Protection.**

ANGLO-IRANIAN OIL CO. CASE.

(*United Kingdom v. Iran*).

(Preliminary Objection.)

International Court of Justice.

(Sir Arnold McNair, President; Guerrero, Vice-President; Alvarez, Basdevant, Hackworth, Winiarski, Zoričić, Klaestad, Badawi Pasha, Read, Hsu Mo, Levi Carneiro, Armand-Ugon, Judges; M. Karim Sandjabi, Judge *ad hoc*.)

Judgment of July 22, 1952.

THE FACTS (as stated by the Court).—" On April 29, 1933, an agreement was concluded between the Imperial Government of Persia (now the Imperial Government of Iran, which name

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the Court will use hereinafter) and the Anglo-Persian Oil Company, Limited (later the Anglo-Iranian Oil Company, Limited), a company incorporated in the United Kingdom. This agreement was ratified by the Iranian Majlis on May 28, 1933, and came into force on the following day after having received the Imperial assent.

“ On March 15 and 20, 1951, the Iranian Majlis and Senate, respectively, passed a law enunciating the principle of nationalization of the oil industry in Iran. On April 28 and 30, 1951, they passed another law ‘ concerning the procedure for enforcement of the law concerning the nationalization of the oil industry throughout the country ’. These two laws received the Imperial assent on May 1, 1951.

“ As a consequence of these laws, a dispute arose between the Government of Iran and the Anglo-Iranian Oil Company, Limited. The Government of the United Kingdom adopted the cause of this British Company and submitted, in virtue of the right of diplomatic protection, an Application to the Court on May 26, 1951, instituting proceedings in the name of the Government of the United Kingdom of Great Britain and Northern Ireland against the Imperial Government of Iran.

“ On June 22, 1951, the Government of the United Kingdom submitted, in accordance with Article 41 of the Statute and Article 61 of the Rules of Court, a request that the Court should indicate provisional measures in order to preserve the rights of that Government. In view of the urgent nature of such a request, the Court, by Order of July 5, 1951, indicated certain provisional measures by virtue of the power conferred on it by Article 41 of the Statute. The Court stated expressly that ‘ the indication of such measures in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case and leaves unaffected the right of the respondent to submit arguments against such jurisdiction ’.

“ While the Court derived its power to indicate these provisional measures from the special provisions contained in Article 41 of the Statute, it must now derive its jurisdiction to deal with the merits of the case from the general rules laid down in Article 36 of the Statute. These general rules, which are entirely different from the special provisions of Article 41, are based on the principle that the jurisdiction of the Court to deal with and decide a case on the merits depends on the will of the Parties. Unless the Parties have conferred jurisdiction on the Court in accordance with Article 36, the Court lacks such jurisdiction.

“ In the present case the jurisdiction of the Court depends on the Declarations made by the Parties under Article 36,

paragraph 2, on condition of reciprocity, which were, in the case of the United Kingdom, signed on February 28, 1940, and, in the case of Iran, signed on October 2, 1930, and ratified on September 19, 1932. By these Declarations, jurisdiction is conferred on the Court only to the extent to which the two Declarations coincide in conferring it. As the Iranian Declaration is more limited in scope than the United Kingdom Declaration, it is the Iranian Declaration on which the Court must base itself. This is common ground between the Parties.

"The Iranian Declaration, which was drafted in French, is as follows:

[*Translation*]

'The Imperial Government of Persia recognizes as compulsory *ipso facto* and without special agreement in relation to any other State accepting the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Permanent Court of International Justice, in accordance with Article 36, paragraph 2, of the Statute of the Court, in any disputes arising after the ratification of the present declaration with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration, with the exception of:

'(a) disputes relating to the territorial status of Persia, including those concerning the rights of sovereignty of Persia over its islands and ports;

'(b) disputes in regard to which the Parties have agreed or shall agree to have recourse to some other method of peaceful settlement;

'(c) disputes with regard to questions which, by international law, fall exclusively within the jurisdiction of Persia.

'However, the Imperial Government of Persia reserves the right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to the Council of the League of Nations.

'The present declaration is made for a period of six years. At the expiration of that period, it shall continue to bear its full effects until notification is given of its abrogation.'

Held (by nine votes to five): that the Court had no jurisdiction. The Court said:

[I. *Meaning of the Expression "Posterior to the Ratification of this Declaration"*.]—"According to the first clause of this Declaration, the Court has jurisdiction only when a dispute relates to the application of a treaty or convention accepted by Iran. The Parties are in agreement on this point. But they disagree on the question whether this jurisdiction is limited to the application of treaties or conventions accepted by Iran after the ratification of the Declaration, or whether it comprises

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the application of treaties or conventions accepted by Iran at any time.

"The Government of Iran contends that the jurisdiction of the Court is limited to the application of treaties or conventions accepted by Iran after the ratification of the Declaration. It refers to the fact that the words '*et postérieurs à la ratification de cette déclaration*' follow immediately after the expression '*traités ou conventions acceptés par la Perse*'.

"The Government of the United Kingdom contends that the words '*et postérieurs à la ratification de cette déclaration*' refer to the expression '*au sujet de situations ou de faits*'. Consequently, the Government of the United Kingdom maintains that the Declaration relates to the application of treaties or conventions accepted by Iran at any time.

"If the Declaration is considered from a purely grammatical point of view, both contentions might be regarded as compatible with the text. The words '*et postérieurs à la ratification de cette déclaration*' may, strictly speaking, be considered as referring either to the expression '*traités ou conventions acceptés par la Perse*', or to the expression '*au sujet de situations ou de faits*'.

"But the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text, having due regard to the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court.

"The text itself conveys the impression that the words '*postérieurs à la ratification de cette déclaration*' relate to the expression which immediately precedes them, namely, to '*traités ou conventions acceptés par la Perse*', to which they are linked by the word '*et*'. This is, in the opinion of the Court, the natural and reasonable way of reading the text. It would require special and clearly established reasons to link the words '*et postérieurs à la ratification de cette déclaration*', to the expression '*au sujet de situations ou de faits*', which is separated from them by a considerable number of words, namely, '*ayant directement ou indirectement trait à l'application des traités ou conventions acceptés par la Perse*'."

[II. Interpretation by reference to similar Terms: Other Declarations.]—"The Government of the United Kingdom has endeavoured to invoke such special reasons. It has relied on the fact that the Iranian Declaration is copied from the corresponding clause adopted by Belgium in 1925 which refers to '*tous les différends qui s'élèveraient après la ratification de la présente déclaration au sujet de situations ou de faits postérieurs*'

à cette ratification'. It is argued that thereafter this formula or a similar one was adopted by numerous States and that the Iranian Declaration must be understood in the same sense, namely, that the expression '*et postérieurs à la ratification de cette déclaration*' relates only to the expression '*au sujet de situations ou de faits*'.

"But these expressions, which in the Belgian Declaration are closely linked to each other, are in the Iranian Declaration separated by the words '*ayant directement ou indirectement trait à l'application des traités ou conventions acceptés par la Perse*'. By the interpolation of these words, the substance of the usual formula was so much altered that it is impossible to seek the real meaning of the Iranian Declaration in that formula. This Declaration must be interpreted as it stands having regard to the words actually used."

[III. *Question of Presumption against Superfluity of Terms used.*]—"The Government of the United Kingdom has further argued that the Declaration would contain some superfluous words if it is interpreted as contended by Iran. It asserts that a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text.

"It may be said that this principle should in general be applied when interpreting the text of a treaty. But the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran, which appears to have shown a particular degree of caution when drafting the text of the Declaration. It appears to have inserted, *ex abundanti cautela*, words which, strictly speaking, may seem to have been superfluous. This caution is explained by the special reasons which led the Government of Iran to draft the Declaration in a very restrictive manner."

[IV. *Interpretation in the Light of Historic Circumstances Accompanying the Declaration.*]—"On May 10, 1927, the Government of Iran denounced all treaties with other States relating to the régime of capitulations, the denunciation to take effect one year thereafter, and it had commenced negotiations with these States with a view to replacing the denounced treaties by new treaties based on the principle of equality. At the time when the Declaration was signed in October 1930, these negotiations had been brought to an end with some States, but not with all. The Government of Iran considered all capitulatory treaties as no longer binding, but was uncertain as to the legal effect of its unilateral denunciations. It is unlikely that the Government of Iran, in such circumstances, should have been willing, on its own initiative, to agree that

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disputes relating to such treaties might be submitted for adjudication to an international court of justice by virtue of a general clause in the Declaration.

“ It is reasonable to assume, therefore, that when the Government of Iran was about to accept the compulsory jurisdiction of the Court, it desired to exclude from that jurisdiction all disputes which might relate to the application of the capitulatory treaties, and the Declaration was drafted on the basis of this desire. In the light of these considerations it does not seem possible to hold that the term ‘ *traités ou conventions* ’, used in the Declaration, could mean treaties or conventions concluded at any time, as contended by the Government of the United Kingdom.

“ It is objected that the Government of Iran, at or about the time when it signed the Declaration, concluded with a number of other States bilateral treaties which provided for arbitration of disputes relating to treaties already concluded or to be concluded. This attitude is said to be contrary to the view that the Government of Iran desired to exclude from the jurisdiction of the Court treaties accepted by it before the ratification of the Declaration.

“ This objection loses all weight when it is viewed in the light of the special reasons which prompted the formulation by the Iranian Government of its Declaration on the one hand, and of the arbitration clauses inserted in certain treaties on the other. That Government was dealing with two different situations, one being particular, the other general. It is quite understandable that it was disposed to accept the arbitration clause as it is expressed in the treaties concluded with certain States which were willing to give up capitulatory rights. But the Government of Iran was confronted with an entirely different problem when it was preparing a Declaration under Article 36, paragraph 2, of the Court’s Statute, binding itself to submit to the jurisdiction of the Court in relation to all States which had signed similar Declarations or which might do so in the future, whether such States had concluded with Iran treaties replacing the régime of capitulations or not.

“ Having regard to these considerations, the Court is satisfied that it was the manifest intention of the Government of Iran to exclude from the jurisdiction of the Court disputes relating to the application of all treaties or conventions accepted by it before the ratification of the Declaration. This intention has found an adequate expression in the text of the Declaration as interpreted above by the Court.”

[V.—*Relevance of Interpretation Adduced before National Legislature.*]—“ That such was the intention of the Government

of Iran is confirmed by an Iranian law of June 14, 1931, by which the Majlis approved the Declaration. This law was passed some months after the Declaration was signed and some months before it was ratified. It was stated in that law that the Majlis approved the Declaration relating to the compulsory jurisdiction of the Court 'as it was signed by the representative of Iran' on October 2, 1930; it was further stated that the law comprised a single article and the text of Article 36 of the Court's Statute, 'together with the conditions of the Iranian Government's accession to the aforesaid Article'. One of these conditions was mentioned as follows:

'In respect of all disputes arising out of situations or facts relating, directly or indirectly, to the execution of treaties and conventions which the Government will have accepted after the ratification of the Declaration.'

"This clause, referring as it does to 'treaties and conventions which the Government will have accepted after the ratification of the Declaration', is, in the opinion of the Court, a decisive confirmation of the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court.

"It is argued that the terms used in the law are not identical with the text of the Declaration. That is true. But it is irrelevant, since the law only paraphrases the Declaration without repeating it textually. Had the Iranian Government been of the opinion that the terms of the law differed from the true meaning of the Declaration, as it was signed in October 1930, it could easily have altered the Declaration. But it did not do so. It ratified it in September 1932 without any modification. It must therefore have considered that the Declaration corresponded to the explanation given in the law of 1931.

"It is contended that this evidence as to the intention of the Government of Iran should be rejected as inadmissible and that this Iranian law is a purely domestic instrument, unknown to other Governments. The law is described as 'a private document written only in the Persian language which was not communicated to the League or to any of the other States which had made declarations'.

"The Court is unable to see why it should be prevented from taking this piece of evidence into consideration. The law was published in the Corpus of Iranian laws voted and ratified during the period from January 15, 1931, to January 15, 1933. It has thus been available for the examination of other Governments during a period of about twenty years. The law is not, and could not be, relied on as affording a basis for the jurisdiction of the Court. It was filed for the sole purpose of throwing

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light on a disputed question of fact, namely, the intention of the Government of Iran at the time when it signed the Declaration.

“ Having regard to the foregoing considerations, the Court concludes that the Declaration is limited to disputes relating to the application of treaties or conventions accepted by Iran after the ratification of the Declaration.”

[VI. *Most-Favoured-Nation Clause and the Operation of a Declaration under the Optional Clause.*].—“ The United Kingdom contends, however, that even if the Court were to hold that the Declaration applies only to disputes relating to the application of treaties or conventions accepted by Iran after the ratification of the Declaration, it would still have jurisdiction in the present case. The contention of the United Kingdom is that the acts of which it complains constitute a violation by Iran of certain of its obligations to the United Kingdom resulting from treaties or conventions accepted by Iran after the ratification of the Declaration. The treaties and conventions relied upon in this connection are:

“ (i) The Treaty of Friendship, Establishment and Commerce concluded between Iran and Denmark on February 20, 1934; the Establishment Convention concluded between Iran and Switzerland on April 25, 1934; and the Establishment Convention concluded between Iran and Turkey on March 14, 1937.

“ (ii) What the United Kingdom Government describes as the ‘ treaty stipulation ’ between the Government of Iran and the Government of the United Kingdom arising out of the settlement in 1933, through the mediation of the Council of the League of Nations, of the international dispute between the United Kingdom and Iran relating to a concession known as the D’Arcy Concession.

“ Article IV of the Treaty of 1934 between Iran and Denmark, upon which the United Kingdom Government relies, provides that:

‘ [Translation] The nationals of each of the High Contracting Parties shall, in the territory of the other, be received and treated, as regards their persons and property, in accordance with the principles and practice of ordinary international law. They shall enjoy therein the most constant protection of the laws and authorities of the territory for their persons, property, rights and interests.’

“ The Establishment Conventions concluded by Iran with Switzerland and Turkey each contain an article similar to Article IV of the Iranian-Danish Treaty.

“ The United Kingdom relies on these three treaties by virtue of the most-favoured-nation clause contained in Article

IX of the Treaty concluded between the United Kingdom and Iran on March 4, 1857, and in Article 2 of the Commercial Convention concluded between the United Kingdom and Iran on February 9, 1903.

“Article IX of the Treaty of 1857 reads:

‘The High Contracting Parties engage that, in the establishment and recognition of Consuls-General, Consuls, Vice-Consuls, and Consular Agents, each shall be placed in the dominions of the other on the footing of the most-favoured nation; and that the treatment of their respective subjects, and their trade, shall also, in every respect, be placed on the footing of the treatment of the subjects and commerce of the most-favoured nation.’

“Article II of the Commercial Convention of 1903 provides as follows:—

‘[*Translation*] . . . It is formally stipulated that British subjects and importations in Persia, as well as Persian subjects and Persian importations in the British Empire, shall continue to enjoy in all respects, the régime of the most-favoured nation . . .’

“It is argued by the United Kingdom Government that the conduct of the Iranian Government towards the Anglo-Iranian Oil Company constitutes a breach of the principles and practice of international law which, by her treaty with Denmark, Iran promised to observe towards Danish nationals, and which, by the operation of the most-favoured-nation clause contained in the treaties between Iran and the United Kingdom, Iran became bound to observe towards British nationals. Consequently, the argument continues, the dispute which the United Kingdom has brought before the Court concerns situations or facts relating directly or indirectly to the application of a treaty—the Treaty of 1934 between Denmark and Iran—accepted by Iran after the ratification of her Declaration.

“The Court cannot accept this contention. It is obvious that the term *traités ou conventions* used in the Iranian Declaration refers to treaties or conventions which the Party bringing the dispute before the Court has the right to invoke against Iran, and does not mean any of those which Iran may have concluded with any State. But in order that the United Kingdom may enjoy the benefit of any treaty concluded by Iran with a third party by virtue of a most-favoured-nation clause contained in a treaty concluded by the United Kingdom with Iran, the United Kingdom must be in a position to invoke the latter treaty. The treaty containing the most-favoured-nation clause is the basic treaty upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third Party.

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A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*.

" It is contended by the United Kingdom that upon the coming into force of the Iranian-Danish Treaty on March 6, 1935, Iran became bound, by the operation of the most-favoured-nation clause, to treat British nationals on her territory in accordance with the principles and practice of international law. Without considering the meaning and the scope of the most-favoured-nation clause, the Court confines itself to stating that this clause is contained in the Treaties of 1857 and 1903 between Iran and the United Kingdom, which are not subsequent to the ratification of the Iranian Declaration. While Iran is bound by her obligations under these Treaties as long as they are in force, the United Kingdom is not entitled to rely upon them for the purpose of establishing the jurisdiction of the Court, since they are excluded by the terms of the Declaration.

" The United Kingdom argued that the question which the Court had to consider was not ' what are the treaties which confer on Great Britain the rights in question ', but ' what are the treaties whose application is in dispute '. But from the legal point of view, what is in dispute is not the application of the Treaty of 1934 between Iran and Denmark, but the application of the Treaty of 1857 or the Convention of 1903 between Iran and the United Kingdom in conjunction with the Treaty of 1934 between Iran and Denmark. There could be no dispute between Iran and the United Kingdom upon the Iranian-Danish Treaty alone.

" The United Kingdom also put forward, in a quite different form, an argument concerning the most-favoured-nation clause. If Denmark, it is argued, can bring before the Court questions as to the application of her 1934 Treaty with Iran, and if the United Kingdom cannot bring before the Court questions as to the application of the same Treaty to the benefit of which she is entitled under the most-favoured-nation clause, then the United Kingdom would not be in the position of the most-favoured-nation. The Court needs only observe that the most-favoured-nation clause in the Treaties of 1857 and 1903 between Iran and the United Kingdom has no relation whatever to jurisdictional matters between the two Governments. If Denmark is entitled under Article 36, paragraph 2, of the Statute, to bring before the Court any dispute as to the application of its Treaty with Iran, it is because that Treaty is subsequent to the ratification of the Iranian Declaration. This can not give rise to any question relating to most-favoured-nation treatment.

"The word 'indirectement' in the phrase 'au sujet de situations ou de faits ayant directement ou indirectement trait à l'application des traités ou conventions' has been relied upon in arguing that the dispute brought before the Court may be considered as involving indirectly the application of a treaty subsequent to the Declaration—the Iranian-Danish Treaty of 1934. The words 'directement ou indirectement' clearly describe the manner in which a certain situation or certain facts forming the subject-matter of a dispute may be related to a treaty: such relation may be direct or indirect. But such direct or indirect relation is not in issue in the present case. What is in issue is whether the United Kingdom, for the purpose of satisfying the requirements of the Declaration, can invoke a treaty to which it is not a party by way of a treaty to which it is a party. The word 'indirectement' cannot apply to the solution of this question. If the United Kingdom is not entitled to invoke its own Treaty of 1857 or 1903 with Iran, it cannot rely upon the Iranian-Danish Treaty, irrespective of whether the facts of the dispute are directly or indirectly related to the latter treaty.

"The Court must, therefore, find in regard to the Iranian-Danish Treaty of 1934, that the United Kingdom is not entitled, for the purpose of bringing its present dispute with Iran under the terms of the Iranian Declaration, to invoke its Treaties of 1857 and 1903 with Iran, since those Treaties were concluded before the ratification of the Declaration; that the most-favoured-nation clause contained in those Treaties cannot thus be brought into operation; and that, consequently, no treaty concluded by Iran with any third party can be relied upon by the United Kingdom in the present case."

[VII. *Concessionary Contract between Government and Company. Whether Partaking of the Nature of a Treaty.*].—"The Court will now consider whether the settlement in 1933 of the dispute between the Government of the United Kingdom and the Government of Iran relating to the D'Arcy Concession, through the mediation of the Council of the League of Nations, resulted, as is claimed by the United Kingdom, in any agreement between the two Governments which may be regarded as a treaty or convention within the meaning of this expression in the Iranian Declaration.

"Whether or not the concession contract of 1933 or the settlement of the dispute in that year constituted an agreement between the Government of Iran and the Government of the United Kingdom is a question relating to jurisdiction, the solution of which does not depend upon a consideration of the merits. It can be and must be determined at this stage, quite

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independently of the facts surrounding the act of nationalization complained of by the United Kingdom.

“ In November 1932 the Iranian Government decided to cancel the D’Arcy Concession. On December 19, 1932, the United Kingdom Government, having protested to the Iranian Government without avail, submitted the case to the Council of the League of Nations. The Council placed the question on the agenda and appointed a Rapporteur. On February 3, 1933, the Rapporteur informed the Council that the Governments of Iran and the United Kingdom had agreed to suspend all proceedings before the Council; that they agreed that the Company should immediately enter into negotiations with the Iranian Government, the respective legal points of view being entirely reserved; and that, in the event that the negotiations should fail, the question should go back to the Council. After prolonged discussion between the representatives of the Iranian Government and the representatives of the Company, an agreement—the Concession Contract—was signed by them at Tehran on April 29. It was subsequently ratified by the Iranian Government. On October 12, the Rapporteur submitted his report, together with the text of the new concession, to the Council, declaring that ‘ the dispute between His Majesty’s Government in the United Kingdom and the Imperial Government of Persia is now finally settled ’. Thereupon the representatives of Iran and the United Kingdom at the Council each expressed their satisfaction at the settlement thus reached. The question was removed from the agenda of the Council.

“ The United Kingdom maintains that, as a result of these proceedings, the Government of Iran undertook certain treaty obligations towards the Government of the United Kingdom. It endeavours to establish those obligations by contending that the agreement signed by the Iranian Government with the Anglo-Persian Oil Company on April 29, 1933, has a double character, the character of being at once a concessionary contract between the Iranian Government and the Company and a treaty between the two Governments. It is further argued by the United Kingdom that even if the settlement reached in 1933 only amounted to a tacit or an implied agreement, it must be considered to be within the meaning of the term ‘ treaties or conventions ’ contained in the Iranian Declaration.

“ The Court cannot accept the view that the contract signed between the Iranian Government and the Anglo-Persian Oil Company has a double character. It is nothing more than a concessionary contract between a Government and a foreign corporation. The United Kingdom Government is not a party to the contract; there is no privity of contract between the

Government of Iran and the Government of the United Kingdom. Under the contract the Iranian Government cannot claim from the United Kingdom Government any rights which it may claim from the Company, nor can it be called upon to perform towards the United Kingdom Government any obligations which it is bound to perform towards the Company. The document bearing the signatures of the representatives of the Iranian Government and the Company has a single purpose: the purpose of regulating the relations between that Government and the Company in regard to the concession. It does not regulate in any way the relations between the two Governments.

“ This juridical situation is not altered by the fact that the concessionary contract was negotiated and entered into through the good offices of the Council of the League of Nations, acting through its Rapporteur. The United Kingdom, in submitting its dispute with the Iranian Government to the League Council, was only exercising its right of diplomatic protection in favour of one of its nationals. It was seeking redress for what it believed to be a wrong which Iran had committed against a juristic person of British nationality. The final report by the Rapporteur to the Council on the successful conclusion of a new concessionary contract between the Iranian Government and the Company gave satisfaction to the United Kingdom Government. The efforts of the United Kingdom Government to give diplomatic protection to a British national had thus borne fruit, and the matter came to an end with its removal from the agenda.

“ Throughout the proceedings before the Council, Iran did not make any engagements to the United Kingdom other than to negotiate with the Company, and that engagement was fully executed. Iran did not give any promise or make any pledge of any kind to the United Kingdom in regard to the new concession. The fact that the concessionary contract was reported to the Council and placed in its records does not convert its terms into the terms of a treaty by which the Iranian Government is bound *vis-à-vis* the United Kingdom Government.

“ The United Kingdom has stressed the similarity between the case of *The Free Zones of Upper Savoy and the District of Gex* and the present case, and has cited the Order made by the Permanent Court of International Justice on December 6, 1930, in the former case to show that the concessionary contract of 1933 ‘laid down what was to be the law between the United Kingdom and Iran’. The Court does not see any analogy between the two cases. The subject-matter of the dispute in that part of the *Free Zones* case which has been relied upon by the United Kingdom related to customs matters, which were

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of direct concern to the two countries, while the subject-matter of the dispute between the United Kingdom and Iran in 1932 and 1933 arose out of a private concession. The conclusion of the new concessionary contract removed the cause of a complaint by the United Kingdom against Iran. It did not regulate any public matters directly concerning the two Governments. It could not possibly be considered to lay down the law between the two States.

"It is thus clear that the proceedings before the Council of the League of Nations which led up to the settlement in 1933 of the dispute between the United Kingdom and Iran relating to the D'Arcy Concession, did not result in the conclusion of any treaty or convention between the two countries.

"The Court has found that the United Kingdom is not entitled to invoke any of the treaties concluded by Iran with Denmark and Switzerland in 1934 and with Turkey in 1937 and that no treaty or convention was concluded in 1933 between Iran and the United Kingdom. No other treaties having been relied upon by the United Kingdom as treaties or conventions subsequent to the ratification of the Iranian Declaration, the Court must conclude that the dispute brought before it by the United Kingdom is not one of those disputes arising 'in regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this Declaration'. Consequently, the Court cannot derive jurisdiction in the present case from the terms of the Declaration ratified by Iran on September 19, 1932."

[VIII. *Forum prorogatum*.]—"During the oral proceedings, the United Kingdom Government presented a Submission 'that the Iranian Government, having in its Conclusions submitted to the Court for decision several questions which are not objections to the jurisdiction of the Court, and which could only be decided if the Court had jurisdiction, has by this action conferred jurisdiction upon the Court on the basis of the principle of *forum prorogatum*'. Although the Agent of the United Kingdom Government stated subsequently that he did not wish to press his contention on this point, the Submission was not formally withdrawn. The Court must, therefore, deal with it.

"The principle of *forum prorogatum*, if it could be applied to the present case, would have to be based on some conduct or statement of the Government of Iran which involves an element of consent regarding the jurisdiction of the Court. But that Government has consistently denied the jurisdiction of the Court. Having filed a Preliminary Objection for the purpose of disputing the jurisdiction, it has throughout the

proceedings maintained that Objection. It is true that it has submitted other Objections which have no direct bearing on the question of jurisdiction. But they are clearly designed as measures of defence which it would be necessary to examine only if Iran's Objection to the jurisdiction were rejected. No element of consent can be deduced from such conduct on the part of the Government of Iran. Consequently, the Submission of the United Kingdom on this point cannot be accepted.

"Accordingly, the Court has arrived at the conclusion that it has no jurisdiction to deal with the case submitted to it by the Application of the Government of the United Kingdom dated May 26, 1951. It is unnecessary for the Court to consider any of the other objections raised to its jurisdiction. Since the Court is without jurisdiction in the present case, it need not examine any arguments put forward by the Iranian Government against the admissibility of the claims of the United Kingdom Government."

[IX. *Provisional Measures of Protection*.]—"In its above-mentioned Order of July 5, 1951, the Court stated that the provisional measures were indicated 'pending its final decision in the proceedings instituted on May 26, 1951, by the Government of the United Kingdom of Great Britain and Northern Ireland against the Imperial Government of Iran'. It follows that this Order ceases to be operative upon the delivery of this Judgment and that the Provisional Measures lapse at the same time."

[Report: *I.C.J Reports*, 1952, p. 93.]

In his Individual Opinion the President, Sir Arnold McNair, said as follows:

"I concur in the conclusion reached in the Judgment of the Court and wish to add some words of my own, as the reasons leading me to this conclusion are not entirely the same as those contained in that Judgment.

"I shall begin by making some remarks of a preliminary character. Under the Covenant of the League of Nations and the Statute of the Permanent Court of International Justice no State was under any obligation to accept the jurisdiction of that Court. However, Article 36, paragraph 2, of the Statute afforded to States an opportunity of doing so by means of a voluntary act. That paragraph (which is reproduced in the Statute of the present Court in terms which are identical in all material respects) was in the nature of a standing invitation made on behalf of the Court to Members of the League of Nations to accept as compulsory, on the basis of reciprocity, the whole or any part of the jurisdiction of the Court as therein defined. It should be noted that the machinery provided by that paragraph is that of 'contracting-in', not of 'contracting-out'. A State, being free either to make a Declaration or not, is entitled, if it decides to make one, to limit the scope of its Declaration in any way it chooses, subject always to reciprocity. Another State seeking to

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found the jurisdiction of the Court upon it must show that the Declarations of both States concur in comprising the dispute in question within their scope. Article 36, paragraph 5, of the Statute of the present Court, which came into force in 1945, provides that Declarations made under Article 36 of the Statute of the Permanent Court and which were then still in force should be deemed to be acceptances of the compulsory jurisdiction of the present Court, and it is common ground between the Parties that the Iranian Declaration ratified on September 19, 1932, was in force when the United Kingdom filed its Application in this Court on May 26, 1951. It is also common ground that the present dispute falls within the scope of the United Kingdom's Declaration.

"An international tribunal cannot regard a question of jurisdiction solely as a question *inter partes*. That aspect does not exhaust the matter. The Court itself, acting *proprio motu*, must be satisfied that any State which is brought before it by virtue of such a Declaration has consented to the jurisdiction. This aspect of the matter was mentioned in the Judgment of the Permanent Court in 1927 in the *Chorzów Factory Case* (Jurisdiction), Series A, No. 9, p. 32 (not a case arising on a Declaration) in the following passage:

'It has been argued repeatedly in the course of the present proceedings that in case of doubt the Court should decline jurisdiction. It is true that the Court's jurisdiction is always a limited one, existing only in so far as States have accepted it; consequently, the Court will, in the event of an objection—or when it has automatically [*d'office*] to consider the question—only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction. When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it. The question as to the existence of a doubt nullifying its jurisdiction need not be considered when, as in the present case, this intention can be demonstrated in a manner convincing to the Court.'

"The principal question before the Court is the meaning of the following words occurring in the Iranian Declaration of acceptance of the jurisdiction of the Court, dated October 2, 1930, and ratified on September 19, 1932:

'sur tous les différends qui s'élèveraient après la ratification de la présente déclaration, au sujet de situations ou de faits ayant directement ou indirectement trait à l'application des traités ou conventions acceptés par la Perse et postérieurs à la ratification de cette déclaration, exception faite pour . . . '.

"Does the reference to treaties or conventions denote treaties or conventions accepted by Iran *regardless of the date of their acceptance*, as the United Kingdom contends, or only treaties or conventions accepted by Iran *after the date of the ratification of the Declaration*, as Iran contends? That is, do the words 'postérieurs à la ratification de cette déclaration' refer to 'situations ou faits', as the United Kingdom contends, or to 'traités ou conventions', as Iran contends? The importance of this matter lies in the fact that the United Kingdom relies, at any rate as a basis of the jurisdiction of the Court, upon certain treaties accepted by Iran before September 19, 1932.

"I need not repeat the discussion of the matter contained in the Judgment of the Court because I accept the conclusion at which the

Court has arrived. Both interpretations are grammatically possible, as Counsel for the United Kingdom admitted. Moreover, both are possible as a matter of substance; both make sense, though the effects of the two interpretations are quite different. In short, there is a real ambiguity in the text, and, for that reason, it is both justifiable and necessary to go outside the text and see whether any light is shed by the surrounding circumstances.

"In 1928 the Assembly of the League of Nations launched a campaign for securing more acceptances of the compulsory jurisdiction of the Permanent Court. This campaign bore fruit, for in the years 1928 to 1932 inclusive some twenty-six States deposited Declarations accepting the compulsory jurisdiction of the Court in some form or another. Among the Governments which responded to the appeal was the Iranian Government. Its contribution was a very modest one, though it enabled its delegate at Geneva to announce to the Assembly on September 16, 1930, that he had received a telegram from Teheran to the effect that his country had 'acceded to the Optional Clause of the Statute of the Permanent Court of International Justice'.

"Iran's limitation of its acceptance to situations and facts relating directly or indirectly to treaties or conventions was unique, and one is naturally led to inquire whether there was any reason for this unusually restrictive attitude, and whether there is anything that indicates which of the two possible interpretations of the formula is the correct one.

"The explanation given by the Iranian Government in paragraph 19 of its Preliminary Observations dated February 22, 1952, in which this Objection to the jurisdiction was raised, is as follows:

'The Iranian Government had, indeed, overwhelming reasons of international policy to limit its acceptance in the way it did: on October 2, 1928 [? 1930], it had denounced all existing treaties, binding it to other States, which were based on a capitulatory system; this resulted in a great number of negotiations for the replacement of former conventions by new agreements based on the equality of the contracting parties.

'The Iranian Government drafted the clause under which it adhered to the Statute of the Court in such a way as to exclude the Court's jurisdiction in respect of international conventions signed before that date, because it had denounced those conventions and because it wanted to put an end generally and finally to the capitulatory system. That is the reason why it was naturally inclined to accept the Court's jurisdiction only in respect of treaties subsequent in date to its adherence, that is to say, to confine ourselves to the essentially political aspect, subsequent to the change which came about in 1928 in Iran's negotiations with other States.'

"This statement—made in 1952—requires investigation, and we must ascertain whether there was during the relevant period 1928 to 1932 anything peculiar in the treaty position or the treaty-making activities of Iran. The gradual break-up of the régime of Capitulations throughout the world during the decade following the first World War is described in Professor A. J. Toynbee's *Survey of International Affairs* for 1928, pp. 349 and 350, and in Wheeler-Bennett's *Documents on International Affairs*, 1928, pp. 200-212. Iran moved in 1927, and on May 10 of that year 'formerly notified all States holding capitulatory privileges in Persia [believed to number at least thirteen] that those privileges would be abolished on May 10, 1928'. As a sequel to this denunciation it became necessary for Iran to overhaul her treaty

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system, to revise her treaties and to replace the former capitulatory system by a series of treaties of commerce and establishment befitting the new status of legal equality which she had asserted and acquired.

"In consequence, as an examination of the *League of Nations Treaty Series* shows, the years 1928 to 1932 were marked by intense activity on the part of Iran in the negotiation of new treaties of friendship or commerce or establishment. In the case of some States formerly holding capitulatory privileges Iran had to be content with provisional solutions embodied in Exchanges of Notes, some of which had not been replaced by formal treaties at the end of 1932 or much later. In short, Iran's treaty system was in a state of suspense and transition, and it was difficult for her to know precisely how she stood in relation to certain States, and what vestiges of the old régime still remained.

"I think it is also necessary to bear in mind the large part that had been played by most-favoured-nation clauses in creating the network of the capitulatory system in Iran and elsewhere.

"A perusal of Hertslet, *Treaties, etc., between Great Britain and Persia, and between Persia and other Foreign Powers* (1891), shows how widespread these clauses were in the treaties of Iran. It is true that these clauses are in no way confined to the system of Capitulations and have been used for hundreds of years by States in their treaty relations without any reference to Capitulations. Nevertheless, from the point of view of a State which had been subject to a system of Capitulations for at least a century and had only recently denounced them and emerged into a new status, it would be surprising if the most-favoured-nation principle was not regarded as an obnoxious concomitant of that system. Such a State, while still engaged in negotiating a new treaty régime restricting the most-favoured-nation principle to normal commercial intercourse, would naturally be shy of accepting any compulsory jurisdiction in terms wide enough to expose itself to the invocation of any part of its old treaty system that might still survive.

"These historical considerations make it easier for me to understand why the Iranian Government should desire to start with a clean slate in regard to the compulsory jurisdiction of the Court and to limit its obligations in that regard to treaties and conventions accepted by it after September 19, 1932.

"The British comment upon the Iranian Government's explanation of the limitations contained in its Declaration, quoted above, is to be found in paragraph 20 of the Observations of the United Kingdom of March 24, 1952. (a) It is said there that the British interpretation of that Declaration would suffice to exclude from compulsory jurisdiction disputes arising out of treaties relating to Capitulations, because even on that interpretation the Declaration is limited to disputes arising after September 19, 1932, and relating to situations or facts subsequent to that date. But Iran's new treaty system was not yet complete on September 19, 1932, when the Declaration was ratified—much less so on October 2, 1930, when it was deposited in Geneva; some of the new treaties had not been ratified; some had not even been negotiated; and in a number of cases all that existed was an Exchange of Notes agreeing upon a 'Provisional Settlement'. In my opinion, it is intelligible, for the reasons given above, that the Iranian Government, when it decided on October 2, 1930, to sign a Declaration, should have confined it to treaties accepted after the ratification of that Declaration.

"(b) Again, it is said by the United Kingdom that during the period 1929-1934 the Iranian Government entered into a large number of treaties with various States in which it accepted some form of international arbitration for disputes arising from the application or

interpretation of treaties, past, present or future. I do not find this answer convincing. It is one thing to agree upon arbitration with a specific State; it is another thing to accept the jurisdiction of the Permanent Court in regard to treaties generally, with the knowledge that that acceptance involves the risk of being compelled to litigate with any Member of the League of Nations which had made a Declaration containing the necessary element of reciprocity. Moreover, if the eleven treaties enumerated in paragraph 21 of the same Observations and cited in support of this argument are examined, it will be found that most of them are treaties made with States formerly holding capitulatory rights in Iran and later willing to substitute new treaties which would recognize Iran's new status of equality; while three of them are with Estonia, Finland and Lithuania—new arrivals on the international scene—which had, so far as I can ascertain, never held capitulatory rights in Iran. Thus the States mentioned in this paragraph are precisely the kind of States with which Iran might be disposed to agree upon some general form of arbitration for disputes upon treaties. In my opinion these eleven treaties are not inconsistent with the view that what the Iranian Government was afraid of when signing its Declaration on October 2, 1930, was the possibility of being summoned before the Permanent Court under that Declaration by virtue of some treaty, or part of some treaty, dating from, or connected with, the régime of Capitulations.

"Accordingly I have formed the opinion that the Iranian Government's interpretation of its Declaration is preferable to that of the United Kingdom and that the Declaration refers only to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Iran *after* September 19, 1932 (and then only subject to the reservations contained in the Declaration, which are not now in question).

"In coming to this conclusion I have not relied on the Iranian Law of January 15, 1931, communicated to this Court as late as June 10, 1952, and I should have preferred that it should be excluded from the consideration of the Court. Its admissibility in evidence is open to question, and its evidentiary value is slight.

"I now come to the second question, namely, whether there are any treaties ratified by Iran *after* September 19, 1932, upon which the United Kingdom can rely in order to establish the jurisdiction of the Court. The United Kingdom's first claim to be able to do this (see paragraph 22 of the Observations of March 24, 1952) rests on what is there described as 'the international engagement between Persia and the United Kingdom to observe the terms of the Concession Convention of 1933'.

"With regard to that Concession Convention, which was made between the Iranian Government and the Anglo-Persian Oil Company, Limited, I accept the finding of the Court and the reasoning which supports it. I do not regard it as falling within the expression 'traités ou conventions acceptés par la Perse'. Neither the circumstances in which it was negotiated, nor the settlement of the contemporaneous dispute between the United Kingdom and Iran which was pending before the Council of the League of Nations, resulted in the creation of a tacit or an implied agreement between the United Kingdom and Iran that can be brought within the formula 'traités ou conventions acceptés par la Perse'. Upon the significance of the expression 'acceptés par la Perse', I draw attention to the observations of the Permanent Court of International Justice in 1924 in the *Mavrommatis Palestine Concessions Case*, Judgment No. 2 (Jurisdiction), Series A, No. 2, at p. 24, on the

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meaning of the expression 'international obligations accepted by the Mandatory', and to the observations of Lord Finlay and Judge Moore to the same effect at pp. 47 and 68. The words 'acceptés par la Perse' would not be apt to describe a tacit or an implied agreement, if any such agreement had arisen. Some meaning must be given to the word 'acceptés'.

"The United Kingdom's second claim to be able to base the jurisdiction of the Court upon a treaty ratified by Iran *after* September 19, 1932, rests upon three treaties made by Iran with Denmark (1934), Switzerland (1934) and Turkey (1937) 'upon the provisions of which' (according to paragraph 22 of the above-mentioned Observations) 'the United Kingdom is entitled to rely by virtue of most-favoured-nation clauses in the treaties of 1857 and 1903 between the United Kingdom and Persia'. These treaties are said 'to bring the present case within the terms of the declaration'. It will suffice, for the purpose of considering this argument, to confine ourselves to the Treaty of 1934 between Iran and Denmark (which came into force on March 21, 1935) and Article 9 of the Anglo-Persian Treaty of 1857, which was expressly preserved on a temporary basis by means of an Exchange of Notes between Iran and the United Kingdom dated May 10, 1928 (*British Parliamentary Paper*, Cmd. 3606).

"Unquestionably, if the jurisdiction of the Court in this case had already been established and if the Court was now dealing with the merits, the United Kingdom would be entitled to invoke against Iran the most-favoured-nation clause (Article 9) of the Anglo-Persian Treaty of 1857, for the purpose of claiming the benefit of the provisions of the Irano-Danish Treaty of 1934 as to the treatment of foreign nationals and their property. But that is not the question now before the Court. The question is whether the United Kingdom can effectively base the jurisdiction of the Court on the Irano-Danish Treaty of 1934 as a treaty 'postérieur à la ratification de cette déclaration'—which is quite another matter.

"Having regard to the view which I have expressed that the Iranian Declaration applies only to treaties ratified by Iran *after* September 19, 1932, I consider that this contention of the United Kingdom encounters two obstacles:

"(a) the first is that the United Kingdom can rely on no treaty between herself and Iran ratified after that date. In reply to that objection, it may be argued that the Iranian formula does not in express terms say that the treaties aimed at by it must be treaties made between Iran and the other Party to the proceedings in this Court. Nevertheless, I am strongly inclined to think that when a State makes a Declaration agreeing, on a basis of reciprocity, to refer disputes arising out of treaties to this Court, that Declaration means disputes arising out of treaties made between the two Parties to the proceedings. However, whether that view is right or wrong, there is the further, and in my opinion fatal, obstacle:

"(b) that the United Kingdom, before it can base its claim on the Irano-Danish Treaty, must establish a connection with it, and this the United Kingdom attempts to do by invoking Article 9 of the Anglo-Persian Treaty of 1857—a treaty which antedates the Iranian Declaration.

"Thus it would be necessary, in order to accept this contention of the United Kingdom, for the Court to hold that the United Kingdom can

"(a) not only invoke a treaty of 1934 between Iran and a third State, but also

"(b) telescope together that treaty and a treaty between Iran and herself of 1857 by praying in aid a most-favoured-nation clause contained in the last-mentioned treaty.

"Can either treaty alone, or both of them together, be called 'un traité ou convention accepté par la Perse' after September 19, 1932, within the meaning of the Declaration? I think not. Such an interpretation seems to me to be artificial and much strained, and I cannot accept it. I do not consider that a State making a Declaration under paragraph 2 of Article 36 can be said to contemplate such a roundabout application of it.

"Nor do I consider that the words 'directement ou indirectement' help the United Kingdom because these words qualify the relation between the situations or facts and the application of the treaty, and are not apt to cover the indirect operation of a most-favoured-nation clause in connecting a treaty of 1857 with a treaty of 1934 for the purpose of satisfying the formula contained in the Iranian Declaration.

"For these reasons I am unable to accept the United Kingdom's claim to base the jurisdiction of the Court upon the treaties with Denmark, Switzerland and Turkey accepted by Iran after September 19, 1932.

"Accordingly the Court has no jurisdiction in this case."

Judge Alvarez in his Dissenting Opinion said, in part:

"The United Kingdom Government applied to the Court on May 26, 1951, in order to protect the interests of the Anglo-Iranian Oil Company, an English company, on the ground that Iran, by nationalizing the oil industry, had violated the rights of that Company, rights derived, in particular, from the Concession Agreement of 1933 concluded between the Company and Iran.

"The United Kingdom Government is therefore not appearing in this case in defence of its *own* interests, but to *protect* the interests of its nationals, which is a very different matter.

"In accordance with the international law in force, a State may formulate a claim against another State in three cases:

"(a) When one of its rights has been violated by that State.

"(b) To protect the rights of its nationals if these rights have been disregarded or violated by that State.

"(c) To defend the rights of a State which has entrusted it with this defence because it cannot directly undertake its own defence, for instance, if it has broken off diplomatic relations with the State which has violated its rights.

"The position of the claimant State is quite different in each of the three cases.

"In the first case, that is to say, where the State is acting in defence of its own interests, attention must be confined to the agreements which have been concluded between the two States.

"In the second case, the claimant State acts in virtue of a right conferred by the law of nations and universally recognized in practice, the right of diplomatic protection of its nationals. In accordance with this law, the action of the claimant State cannot be met by any of the arguments that could be raised against it if it were acting on its own behalf: the only objections which can be raised to such a claim are those which are based upon international law or which result from the nature of the right which the claimant relies on.

"No difficulty arises in respect of the third case. The State against which the claim is made can, as against a State acting on behalf of

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the claimant State, rely only upon conventions or agreements concluded between the last-named State and itself.

"It must be pointed out as regards diplomatic protection that, according to the new international law, it may assume three different forms which depend upon the organ before which that protection is exercised: (a) direct protection or claim against a State; (b) protection before the Security Council of the United Nations; (c) protection before the International Court of Justice.

"These three aspects of diplomatic protection will disappear or will undergo changes when the new international law clearly establishes the international rights of the individual, *i.e.*, those rights which he will be entitled to invoke directly against a State without resorting to the diplomatic protection of the country of which he is a national.

"What is the scope of Article 36, paragraph 2, of the Statute of the Court? Is the Court competent to deal with matters other than those specifically indicated in that Article?"

"These questions, in my opinion, constitute the crucial point of the present case.

"The arguments which we have heard proceeded from the basis, which was regarded as indisputable, that the Court's jurisdiction is determined solely by Article 36, paragraphs 1 and 2, of its Statute and that it is consequently derived almost entirely from the consent of the Parties. This explains the long arguments as to the scope of Iran's adherence to the provisions of that Article.

"This view is incorrect.

"It should be pointed out, in the first place, that Articles 36 and 38 of the Statute of the Court, in Chapter II relating to the competence of the Court, are very defective. Article 38, which reproduces Article 38 of the Statute of the Permanent Court of International Justice, has long been the subject of strong criticism, of which no account was taken at the San Francisco Conference when that Article was revised. It is therefore for the International Court of Justice to determine its true scope. The same must be said of Article 36.

"That article, Article 36, refers to disputes which may arise between States; these relate to rights flowing from agreements concluded between these States or from rules established by international law with regard to given questions (land domain, maritime domain, etc.). What are involved therefore are disputes ordinarily relating to instruments to which two or more States are parties.

"But in addition to such rights there are others, directly established by international law, which have not been sufficiently brought out in the present case to determine the Court's jurisdiction. These rights do not result from the will of States or from other juridical acts, but from the revitalized conscience of the people which takes account of the general interest. These rights do not create direct obligations between States; their existence may not give rise to discussion but must be protected in the event of their violation.

"Among these rights, it is necessary to mention in particular those which are said to be fundamental rights of States (the right to independence, to sovereignty, to equality, etc.), as well as certain other rights conferred by the law of nations, such as that of the protection of nationals, the right to be indemnified for injuries, and so forth.

"Article 36 of the Statute of the Court does not refer to the rights falling within this second category, for they do not give rise to disputes and, perhaps for this reason, no thought was given to them. But Article 36 does not exclude them from the Court's jurisdiction; if this had been the intention, it would have been stated expressly.

"How then is this gap to be filled, or in short, how is the Court's jurisdiction with regard to this second category of rights to be determined? In order to do this, it is necessary to have recourse to the *spirit* of the Charter of the United Nations, of which the Statute of the Court forms an integral part (Article 92 of the Charter), and to the general principles of the law of nations. It is moreover necessary to have regard to the international consequences which might result from a restrictive interpretation of Article 36.

"The Charter seeks to add to the prestige of the law of nations, as appears from the Preamble, paragraph 3, from Article 1, paragraph 1, of Chapter I, from Article 2, paragraph 3, as well as from Article 13 (a) and from Articles 36 and 38. International law and the International Court of Justice are, at the present time, closely linked together: it is impossible to conceive of an International Court which does not apply the law of nations, or of this law without a Court to apply it.

"In accordance with the spirit of the Charter, and with the general principles of international law, all the rights of States must be fully recognized and protected and the conflicts to which they may give rise must be settled by peaceful means.

"There is a fundamental difference between classical international law and the new international law with regard to the means available to States to assert the two categories of rights indicated above.

"Under *classical international law*, disputes between States arising from conventions or facts giving rise to legal relations, or from rules established by the law of nations on given matters, had to be settled by means freely chosen by the parties; but if the parties could not agree as to these means, the dispute remained unresolved and consequently the stronger State could to some extent impose its will upon the weaker.

"The same is true with regard to the *exercise* of a right expressly recognized by the law of nations, that is to say those rights which fall within the second category referred to above. Here again, if some peaceful settlement is not reached, a strong State can impose its will upon a weak State: and if the latter be the claimant, its right remains of no practical value.

"In the *new international law* the matter is wholly different. In accordance with this law, and in particular with the spirit of the Charter, all disputes between States must be resolved by peaceful means, and all the rights recognized by the law of nations must be respected and must have a sanction.

"To this end, the Charter created an international organization comprising, among other organs, the Security Council and the International Court of Justice.

"If the Statute of the Court were intended to limit the powers of the Court solely to the solution of disputes relating to rights of the first category referred to above, it would, as I have said, have expressly so provided. The Court then would be, in effect, a mere international court of *arbitration*. It would have been better, in these circumstances, to have confirmed the Permanent Court of Arbitration set up in 1899, which has the advantage of being composed of judges selected in each case by the parties themselves. But the present Court is, according to its Statute, a Court of *justice* and, as such, and by virtue of the dynamism of international life, it has a double task: to *declare* the law and *develop* the law. Its first task includes the *settlement of disputes* between States as well as the *protection of the rights* of those States as recognized by the law of nations. As regards the Court's second task, namely, the development of law, it consists of deciding the existing law, modifying it and even creating new precepts, should this be necessary. This second

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mission is justified by the great dynamism of international life. The Third Session of the General Assembly of the United Nations has recognized the Court's rights to develop international law in its Resolution No. 171. The Institute of International Law has on its side in the recently held Session at Siena expressly recognized this right of the Court. In creating a commission, the Institute unanimously adopted the following Resolution: [*Translation*] 'The Institute of International Law, keenly aware of the growing importance of the International Court of Justice and of its rôle in the development of international law . . . ' In discharging this task the Court must not proceed in an arbitrary manner, but must seek inspiration in the great principles of the new international law.

" With regard to the protection of these rights, it is unnecessary to ascertain whether the complainant or the State against which the claim is made has or has not accepted the jurisdiction of the Court, or whether it is or is not a Member of the United Nations. Every State in the world is today a member of the international community, or rather, of the international society; all are subject to the law of nations and have the rights and obligations laid down by that law. It is impossible to suppose that a State not a Member of the United Nations, or one which has not accepted the jurisdiction of the Court, should be able to violate the rights of other States and that it should not be possible to bring it before the Court; or, conversely, that a State which is a Member of the United Nations should be able so to act with regard to a non-member State.

" The Court, in its Advisory Opinion of April 11, 1949, on 'Reparation for Injuries suffered in the Service of the United Nations' expressly adopted the above-mentioned point of view. It held that 'in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State which *is not a member*, the United Nations, as an Organization, has the capacity to bring an international claim against the responsible *de jure* or *de facto* Government with a view to obtaining the reparation due in respect of the damage caused to the United Nations'.

" It must be noted that in that Opinion, the Court actually *created* the law.

" The State responsible may therefore be brought before the Court without its being necessary to inquire whether it has or has not accepted the jurisdiction of the Court or whether it has adhered to the provisions of Article 36 (2) of its Statute.

" If the United Nations brought before the Court a claim against a State on the grounds above referred to, could it be possible for the Court to reject the claim brought by this Organization, on the basis of Article 34 (1) of the Statute, which provides that: 'only States may be parties in cases before the Court', and on the ground that the United Nations are not a State? This would be nonsense.

" It should be pointed out too, with regard to rights of the second category above referred to, that the new international law has reinforced and amplified the rights which already existed and it has recognized or conferred others which are of great importance and which have no existence in classical international law. I shall mention but three, because they are closely linked with the substance of the present dispute: that of the *protection of nationals*, which is reinforced, that resulting from a *denial of justice* and that resulting from an *abus du droit*. This last concept, which is relatively new in municipal law (it finds a place in the Civil Codes of Germany and Switzerland) is finding its way into international law and the Court will have to give it formal recognition at the appropriate time.

" Efforts are moreover being made at the present time to establish a universal declaration of the rights of the individual, and in order to give these rights protection on an international level, it is sought to create a special Court. It is clear that it will be enough for the State concerned to present itself before that Court or, failing that, before the International Court of Justice for it to obtain satisfaction.

" Lastly, if the Court should hold that it lacks jurisdiction whenever rights of the second category of which I have spoken are concerned, very important cases might occur in which such a holding of lack of jurisdiction would cause disappointment and would considerably damage the prestige of this tribunal.

" In conclusion, the Court should interpret and even develop Article 36 of its Statute in the sense indicated above.

" In conclusion, I shall merely indicate briefly certain other observations with regard to the jurisdiction of the Court for the purpose of completing what may be called a *general theory* of the Court's competence.

" (1) The Court is competent to give an opinion on all questions submitted to it by the Security Council or the Assembly of the United Nations. Its jurisdiction results from the fact that the Court is one of the organs of the United Nations (Article 7 of the Charter).

" (2) Many international relations have at the present time a political as well as a juridical aspect; this was recognized by the Court in its Advisory Opinion of May 28, 1948. In such cases, the Court must consider both these aspects of cases submitted to it.

" (3) It may happen that a dispute has entirely separate juridical and political aspects. In such a case, the Court is competent to deal with the juridical aspect and the Security Council is competent to deal with the political aspect.

" (4) If a case submitted to the Court should constitute a threat to world peace, the Security Council may seize itself of the case and put an end to the Court's jurisdiction. The competence of the Council results from the nature of the international organization established by the Charter, and from the powers of the Council.

" *Conclusions*

" The following conclusions result from the legal considerations which I have set out, in the case now before the Court:

" (1) The Court has jurisdiction to deal with the claim presented against Iran by the United Kingdom by reason of the Iranian Declaration of adherence to the provisions of Article 36, paragraph 2, of the Statute of the Court.

" (2) The Court has jurisdiction, in particular, because the United Kingdom is not acting in the present case in defence of its own interests, but to protect the interests of one of its nationals, the Anglo-Iranian Oil Company.

" Since the United Kingdom is exercising this right of protection, it cannot be met with arguments as to the scope of the Iranian Declaration of adherence to the provisions of Article 36, paragraph 2, of the Statute of the Court, because what is involved is not a dispute between these two countries, but the exercise of a right recognized by the law of nations.

" (3) In view of the nature of the reserved domain at the present day, the Court's jurisdiction cannot be limited by the Iranian contentions with regard to this domain.

" (4) The Court has a very wide jurisdiction for the protection of rights directly conferred upon States by international law (those relating to the protection of nationals, to reparation for injury unjustly suffered,

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to denials of justice, to *abus du droit*, etc.). Its jurisdiction in this connection cannot be limited by the non-adherence of the State against whom the claim is made to the provisions of Article 36, paragraph 2, of the Statute of the Court.

"The exercise of some of these rights may constitute the merits of the dispute between the United Kingdom and Iran."

Judge Hackworth in his Dissenting Opinion said, in part:

"I agree with the conclusion of the Court that the Declaration applies only to treaties and conventions accepted by Iran subsequent to the ratification of its Declaration. I do not, however, consider that, in reaching this conclusion, it was necessary or even permissible for the Court to rely upon the Iranian Parliamentary Act of approval as evidence of the intention of the Iranian Government, since that was a unilateral act of a legislative body of which other nations had not been apprised. National courts may, as a matter of course, draw upon such acts for municipal purposes, but this Court must look to the public declarations by States made for international purposes, and cannot resort to municipal legislative enactments to explain ambiguities in international acts. The fact that this was a public law which was available after 1933 to people who might have had the foresight and the facilities to examine it, is no answer. When a State deposits with an international organ a document, such as a declaration accepting compulsory jurisdiction of the Court, upon which other States are expected to rely, those States are entitled to accept that document at face value; they are not required to go back to the municipal law of that State for explanations of the meaning or significance of the international instrument. Such a procedure would in many cases lead to utter confusion. This is not a case of drawing upon the *travaux préparatoires* of a bilateral or multilateral agreement to explain ambiguities. Had the Act of Parliament been attached to the instrument of ratification filed by Iran with the League of Nations, a different situation would have been presented. Other States would thus have been on notice of the discrepancy between the Declaration and the act of approval. But this was not done.

"I also agree with the Court that the Concession Agreement between Iran and the Anglo-Iranian Oil Company, Limited, of 1933, cannot be regarded as a treaty or convention in the international law sense, and consequently cannot be regarded as coming within the purview of the Iranian Declaration.

"I regret that I cannot agree with the conclusion of the Court that the United Kingdom is not entitled for jurisdictional purposes, to invoke, by virtue of the most-favoured-nation clauses in earlier treaties between that country and Iran, provisions of treaties concluded by Iran with other countries subsequent to the ratification of its Declaration accepting jurisdiction of the Court.

"The conclusion that the treaty containing the most-favoured-nation clause is the *basic* treaty upon which the United Kingdom must rely amounts, in my judgment, to placing the emphasis on the wrong treaty, and losing sight of the principal issue. The gravamen of the complaint of the United Kingdom Government is that Iran has not accorded to a British national, the Anglo-Iranian Oil Company, the benefits of international law and that, as a result, the Company has suffered a denial of justice. The provisions with respect to the application of the principles of international law are not to be found in the most-favoured-nation clause of the earlier treaties of 1857 and 1903 between Iran and the United Kingdom, but are embodied in the later treaties

between Iran and Denmark of 1934; between Iran and Switzerland of that same year, and between Iran and Turkey of 1937. It is to these treaties and not to the most-favoured-nation clause that we must look in determining the rights of British nationals in Iran. These then are the *basic* treaties. The most-favoured-nation clause in the earlier treaties is merely the operative part of the treaty structure involved in this case. It is the instrumentality through which benefits under the later treaties are derived. It is in these later treaties that we find the *ratio decidendi* of the present issue.

" This conclusion will the more clearly appear if we further examine the treaty provisions in the light of what has just been said.

" Article IX of the Treaty of Peace of March 4, 1857, between Great Britain and Persia, provides:

' The High Contracting Parties engage that, in the establishment and recognition of Consuls-General, Consuls, Vice-Consuls and Consular Agents, each shall be placed in the dominions of the other on the footing of the most-favoured nation; and that the treatment of their respective subjects, and their trade, shall also, in every respect, be placed on the footing of the treatment of the subjects and commerce of the most-favoured nation.'

" Similar provisions are contained in Article 2 of the Commercial Convention of May 27, 1903, between the two countries.

" This is not a unique most-favoured-nation clause, peculiar to a capitulatory régime, such as obtained in Persia during that era. It is wholly reciprocal in character. It is the sort of provision that is to be found in many treaties of commerce and navigation, ancient and modern. But that which is even more significant is the fact that in 1928, at a time when Persia was terminating the extraterritorial privileges of aliens, there was an exchange of notes, on May 10, between the British Minister to Persia and the Persian Acting Foreign Minister, by which it was agreed that the most-favoured-nation provisions of Article IX of the Treaty of 1857 should remain in force. This has not been questioned by Iran.

" The Treaty of Friendship, Establishment and Commerce, concluded between Iran and Denmark on February 20, 1934, provides in Article IV that:

' The nationals of each of the High Contracting Parties shall, in the territory of the other, be received and treated, as regards their persons and property, in accordance with the principles and practice of ordinary international law. They shall enjoy therein the most constant protection of the laws and authorities of the territory, for their persons, property, rights and interests.'

" Similar provisions are contained in Article I of the Establishment Convention of April 25, 1934, between Iran and Switzerland, and in Article 1 of the Establishment Convention of March 14, 1937, between Iran and Turkey.

" It will thus be apparent, using the Danish Treaty as the criterion, that Danish nationals in the territory of Iran and their property are entitled by Article IV of the Treaty of 1934 to be treated 'in accordance with the principles and practice of ordinary international law'.

" The United Kingdom is entitled, by virtue of the most-favoured-nation provisions quoted above, to claim for British nationals in Iran no less favourable treatment than that promised by Iran to Danish nationals.

" The Government of the United Kingdom has contended that the treatment accorded by Iran to the Anglo-Iranian Oil Company is not

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in keeping with the requirements of international law, and has invoked the Danish Treaty.

"The Court is not called upon to say whether this contention is or is not warranted. It need only say, for present purposes, whether these treaty provisions to which Iran has subscribed bring the case within the purview of the Iranian Declaration accepting compulsory jurisdiction of the Court.

"I readily agree with the majority that the most-favoured-nation provisions of the earlier treaties and the provisions of the later treaties are interrelated and must be considered together in order that benefits under the latter may be claimed. But I cannot accept, for reasons which follow, the conclusion that the necessity for invoking the earlier treaties as a means of claiming benefits under the later ones, constitutes a bar to the exercise of jurisdiction by the Court under the Iranian Declaration. This it seems to me is giving far more weight to the restrictive features of the Iranian Declaration than is warranted.

"One cannot dispute the fact that the jurisdiction of the Court is a limited one. Acceptance of jurisdiction by States is purely a voluntary act on their part; and it necessarily follows that, unless a State has by special agreement, by treaty or convention, or by a declaration made under the Optional Clause of Article 36, paragraph 2, of the Statute, accepted jurisdiction, the Court is without jurisdiction.

"On the other hand, when a State has filed a declaration under the Optional Clause of Article 36 of the Statute accepting jurisdiction, it has performed a voluntary act. It has voluntarily and unilaterally notified the world that it is prepared to submit certain classes of disputes to judicial examination by this Court.

"Iran took full advantage of its liberty of action under the Statute by submitting a declaration, adroitly drafted, limited in scope to a comparatively narrow category of cases, and further safeguarded by three specific exceptions and a reservation, not pertinent to the present discussion. We are concerned with the meaning and scope of this Declaration. Precisely we are concerned with the meaning of the undertaking by Iran to accept the jurisdiction of the Court with respect to disputes arising after ratification of the Declaration with regard to situations or facts

'... relating directly or indirectly to the application of treaties or conventions accepted by Persia and subsequent to the ratification of this declaration.'

"It is common knowledge that this dispute arose after ratification of the Declaration. It is also common knowledge that it relates 'directly or indirectly' to the application of treaties or conventions accepted by Iran. The pivotal question is whether the treaties or conventions relied upon by the United Kingdom were accepted by Iran 'subsequent to ratification' of the Declaration.

"It is no part of the functions of the Court to give to such a declaration a broader meaning or a more restrictive meaning than the State itself has seen fit to prescribe. Our duty is to find that plain and reasonable meaning which more nearly comports with the purpose of the State as disclosed by the language which it itself has employed.

"I find nothing in the Iranian Declaration to suggest that it is necessary that action under it shall be premised exclusively on a single treaty. I find nothing to suggest that it is necessary that such an action shall be based on a treaty between the plaintiff State and the defendant State. The Declaration, though drafted with meticulous safeguards, does not specify any such condition, nor does it specify

that in considering a dispute as to the application of a treaty or convention accepted by Iran subsequent to the ratification of the Declaration, an earlier treaty may not be drawn upon. This would indeed have been a strange limitation. All that the Declaration requires in order that the dispute shall fall within the competence of the Court, is that it shall relate to the application of treaties or conventions accepted by Iran subsequent to the ratification of the Declaration, and nothing more.

"The Danish Treaty answers this description. It is in that Treaty and not in the most-favoured-nation clause that the substantive rights of British nationals are to be found. Until that Treaty was concluded, the most-favoured-nation clauses in the British-Persian treaties were but promises, in effect, of non-discrimination, albeit binding promises. They related to rights *in futuro*. There was a right to claim something but it was an inchoate right. There was nothing to which it could attach itself unless and until favours should be granted to nationals of another country. But when Iran conferred upon Danish nationals by the Treaty of 1934 the right to claim treatment 'in accordance with the principles and practice of ordinary international law', the right thereupon *ipso facto* became available to British nationals. This new right—based on international law concepts—came into existence not by virtue of the earlier treaties alone or even primarily, but by them plus the new treaties which gave them vitality. The new treaty is, in law and in fact, the fountain-head of the newly-acquired rights.

"To summarize, the United Kingdom has a right to claim the benefits of the Danish Treaty of 1934. It matters not that that right was acquired through the operation of a most-favoured-nation clause of a treaty anterior to the ratification of the Iranian Declaration. The important thing is that it is a right acquired subsequent to ratification of that Declaration. It is the later treaty, and not the most-favoured-nation clause, that embraces the assurance upon which reliance is sought to be placed. A conclusion that jurisdiction does not lie, amounts, in my judgment, to giving to the restrictive features of the Iranian Declaration a more far-reaching scope than is warranted by the language there used."

Judge Read in his Dissenting Opinion said, in part:

"Before examining the Persian Declaration, it is necessary to decide upon the method of approach to the problem of interpretation. There are no specific rules of international law which bear directly on the issues which the Court must decide. There are, however, important general principles, which need to be taken into account in the circumstances of this case.

"The first principle was applied by this Court in its Opinion—Admission to the United Nations, I.C.J. Reports 1950, p. 8—and stated in the following words:

'The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.'

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"The second principle is, in reality, a special aspect of the first. It was applied by this Court in its Opinion—Peace Treaties II, I.C.J. Reports 1950, p. 229—and stated in the following words:

"It is the duty of the Court to interpret the Treaties, not to revise them."

"I am unable to accept the contention that the principles of international law which govern the interpretation of treaties cannot be applied to the Persian Declaration, because it is unilateral. Admittedly it was drafted unilaterally. On the other hand, it was related, in express terms, to Article 36 of the Statute, and to the declarations of other States which had already deposited, or which might in the future deposit, reciprocal declarations. It was intended to establish legal relationships with such States, consensual in their character, within the régime established by the provisions of Article 36.

"There is an additional consideration which, strictly speaking, is not a principle, but a rejection of a fallacious theory.

"It has been contended that the Court should apply a restrictive construction to the provisions of the Declaration, because it is a treaty provision or clause conferring jurisdiction on the Court. Further, it has been suggested that a jurisdictional clause is a limitation upon the sovereignty of a State, and that, therefore, it should be strictly construed.

"The making of a declaration is an exercise of State sovereignty, and not, in any sense, a limitation. It should therefore be construed in such a manner as to give effect to the intention of the State, as indicated by the words used; and not by a restrictive interpretation, designed to frustrate the intention of the State in exercising this sovereign power.

"In support of the contention that a restrictive interpretation should be applied, it is possible to cite certain *obiter dicta* of the Permanent Court; and, particularly, statements made in two cases—the Free Zones Case, Series A/B, No. 46, p. 138, and in the Phosphates of Morocco Case, Series A/B, No. 74, p. 23. It should, however, be observed that in neither of these cases did the Court rely upon restrictive interpretation as the basis of its decision.

"Article 38 of the Statute is mandatory, and not discretionary. It requires the Court to apply judicial decisions as a subsidiary means for the determination of rules of law. The expression 'judicial decisions' certainly includes the jurisprudence of this Court and of the Permanent Court. I have no doubt that it includes the principles applied by the Court as the basis of its decisions. It is, however, equally clear that it cannot possibly be construed as requiring this Court to apply *obiter dicta*.

"It would take too long to review the jurisprudence of the Permanent Court and of this Court. I have been unable to find any case in which either Court relied upon a restrictive interpretation to a jurisdictional clause as a basis for its judgment. I am satisfied that both Courts have decided jurisdictional questions in conformity with the principles, as stated above. Indeed, both Courts have, within the limitations established by those principles, given liberal interpretations to jurisdictional clauses, designed to give full effect to the intentions of the parties concerned. It is sufficient to refer to one decision of this Court. In the *Ambatielos Case*—I.C.J. Reports, 1952, p. 28—this Court upheld its jurisdiction, notwithstanding that a restrictive construction of the jurisdictional clause would have led, inevitably, to an opposite result. [See Case No. 96 in this volume.]

"There is a further and compelling reason for rejecting the theory

of restrictive interpretation of jurisdictional clauses. This Court is in a different position from that which was occupied by the Permanent Court. This Court is directly bound by the provisions of the Charter, and it is 'the principal judicial organ of the United Nations'. It cannot ignore the Preamble of the Charter, and its statement of Purposes and Principles. It cannot overlook the fact that the acceptance of the compulsory jurisdiction of the Court is one of the most effective means whereby Members of the United Nations have sought to give practical effect to the Preamble and to the Purposes and Principles. I should be failing in my duty, as a judge, if I applied a rule of interpretation, designed to frustrate the efforts of the Members to achieve this object.

"In the light of these considerations, it becomes necessary to consider whether Iran, by virtue of the Declaration of 1932, has consented to the exercise of jurisdiction by this Court in the sort of case which has been brought by the United Kingdom.

"It will be convenient to begin with the question whether the United Kingdom is entitled to rely upon the application of the provisions of treaties concluded, after the ratification of the Declaration, between Iran and third States, and invoked by virtue of most-favoured-nation clauses contained in older British treaties.

"The United Kingdom has invoked the provisions of the most-favoured-nation clause of the Treaty of 1857, Article IX, which provides 'that the treatment of their respective subjects, and their trade, shall also, in every respect, be placed on the footing of the treatment of the subjects and commerce of the most-favoured nation'. It will be observed that this clause was fully reciprocal, conferring rights and privileges on both parties. On the abandonment of the régime of capitulations in 1928, these provisions were maintained by exchange of notes.

"The United Kingdom Government thus bases its case on the provisions of three treaties concluded by Persia with Denmark and Switzerland in 1934 and by Iran with Turkey in 1937. For the purpose of this opinion it will be sufficient to consider the provisions of the treaty with Denmark, which was accepted by Persia after the ratification of the Declaration.

"The Danish treaty, in Article IV, contained the following provision:

'The nationals of each of the High Contracting Parties shall, in the territory of the other, be received and treated, as regards their persons and property, in accordance with the principles and practice of ordinary international law. They shall enjoy therein the most constant protection of the laws and authorities of the territory for their persons, property, rights and interests . . .'

"There can be no doubt that legally, by virtue of the invocation of the provisions of the Denmark treaty, Iran is under a treaty obligation to treat British nationals 'in accordance with the principles and practice of ordinary international law'.

"The mere existence of a case based upon the Danish treaty invoked by virtue of a most-favoured-nation clause would not justify the Court in finding that it had jurisdiction. It is necessary that it should be a case coming within the scope of the Persian Declaration. For this purpose it is necessary to proceed upon the assumption that the Court has decided that the Declaration must be interpreted as applying only to treaties or conventions accepted by Persia after the ratification of the Declaration.

"In dealing with this aspect of the case it is possible to concentrate upon a few words in the Declaration. I do not mean that we should

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ignore the context; but, for the moment, we should examine closely the following words:

‘... with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia.’

“Our problem is to determine whether the Anglo-Iranian Oil Company dispute relates directly or indirectly to the application of the Danish treaty, one which admittedly was accepted by Persia after the ratification of the Declaration.

“There is no doubt that the dispute and the facts relate *directly* to the application of the Treaty of 1857. It is, however, equally clear that they relate *indirectly* to the application of the provisions of the Danish treaty which have been invoked by virtue of the most-favoured-nation clauses.

“Here it is necessary to go back to the principles to which I referred in the earlier part of this opinion.

“The fact that jurisdiction depends on the will of the parties makes it necessary to consider what the will of the Persian Government was at the time when it made the Declaration. That will was expressed in the words used, and in order to determine it, the first principle must be applied. It is necessary to give effect to the words used in their natural and ordinary meaning in the context in which they occur. The second principle is equally important. It is my duty to interpret the Declaration and not to revise it. In other words, I cannot, in seeking to find the meaning of these words, disregard the words as actually used, give to them a meaning different from their ordinary and natural meaning, or add words or ideas which were not used in the making of the Declaration.

“If the words ‘directly or indirectly’ had been omitted from the Declaration, it would have been possible to assume that the jurisdiction was restricted to situations or facts which related directly to treaties or conventions accepted by Persia. But the words ‘directly or indirectly’ were not omitted from the Declaration; and any attempt to construe it by ignoring this expression would amount to revision which a judge cannot do. Further, to give the words ‘directly or indirectly’ some different and artificial meaning would again amount to a revision and would be beyond my powers as a judge. Similarly, any attempt to suggest that there is to be found in the Declaration, considered as a whole, a positive intention to exclude disputes on the ground that they may be to some extent based upon the provisions of earlier treaties would again be an attempt to revise the Declaration by the incorporation of words that are not there.

“There are two considerations that strongly support the interpretation which is based on the natural and ordinary meaning of the words used. The first is that the Persian Government was certainly aware, at the time of the Declaration, of the existence of the most-favoured-nation clause referred to above. There were doubtless others. It must have had under consideration the possibility, or even the probability, of disputes arising which would relate directly to the application of such clauses and indirectly to the application of subsequent treaties or conventions. In drafting the Declaration, deliberate use was made of the disjunctive ‘or’, which has an unequivocal meaning. There can be no doubt that the Persian Government envisaged a system of compulsory jurisdiction which would be broad enough to include disputes arising in this way. Assuming such an intention, I do not know of any way in which it could have been more clearly indicated than by using this expression ‘directly or indirectly’.

"It is, of course, true that the drafting of the Declaration was imperfect; and that it is possible, by purely grammatical argument, to attribute a different and unrealistic meaning to this expression. But I cannot rely on purely grammatical interpretation. While the grammatical construction may be open to criticism, there can be no real doubt as to what the draftsman had in mind when he deliberately interpolated the expression 'directly or indirectly' in the middle of the text. He certainly meant to ensure that the scope of the Declaration should be broadened so as to cover disputes and facts having an indirect relationship with the treaties or conventions in question.

"The second consideration is that the arguments which have been advanced as leading the Persian Government to exclude the older treaties from the compulsory jurisdiction of the Court could have no conceivable application to compulsory jurisdiction relating to those modern treaty provisions which had nothing to do with the régime of capitulations which were applicable indirectly through the medium of most-favoured-nation clauses. Here it must be borne in mind that, at the date of the Declaration, Article IX of the Treaty of 1857 no longer had the character of a provision of an old treaty of the régime of capitulations. Originally, it possessed that character; but in 1928 the United Kingdom concurred in a denunciation of the objectionable provisions of the Treaty. The two States agreed, by exchange of notes, to maintain the most-favoured-nation clause, Article IX, pending the negotiation and conclusion of a new treaty of commerce and navigation. In reality, the most-favoured-nation clause relied upon by the applicant is founded upon a new agreement, accepted by Persia before the ratification, but after the disappearance of the régime of capitulations.

"Further, the most-favoured-nation clauses were reciprocal in character, and entirely consistent with the new and independent status which was resulting from the denunciation of capitulations. They furnished the keys which unlocked the doors for Persian merchants in the four corners of the earth, and protected them while engaged in their far-flung trading enterprises. They were essential to the national economy. The fact that their provisions were kept alive, by special stipulations, after the ending of capitulations in 1928, is proof that the Persian Government, far from grouping them with the treaties of the old régime, regarded them in an entirely different light.

"There is nothing in the context which could justify the rejection of the natural and ordinary meaning to the words under consideration. Certain arguments have, however, been presented in the course of the oral proceedings. It has been contended that this claim is based upon the most-favoured-nation clause. Of course it is. This claim has a *direct* basis in the most-favoured-nation clauses and an *indirect* basis in the Danish treaty invoked by virtue of their provisions. The argument is completely irrelevant because the task of the Court is the very simple one of deciding whether Persia by this Declaration consented to the exercise of jurisdiction in disputes relating directly *or* indirectly to the application of treaties accepted by Persia.

"In view of these considerations, I have reached the conclusion that the United Kingdom is entitled to invoke the provisions of the Danish treaty as a basis for the jurisdiction of the Court. It must however be understood that, in reaching this conclusion, I do not want to prejudice the merits. I cannot consider, in a preliminary proceeding, whether the subject-matter of the dispute comes within the scope of these provisions, because this question has not been discussed by counsel and because it is essentially a part of the merits. Accordingly, and subject to this reservation, I have concluded that the present claim is

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one which is based *indirectly* on the application of the Danish treaty, which was accepted by Persia after the date of the Declaration. Accordingly, the Iranian Objection to the Jurisdiction, as regards this part of the case, should be overruled, or at most joined to the merits.

"In view of the foregoing conclusion, it is unnecessary for me to discuss that part of the judgment of the Court which upholds the Iranian objection on the ground that the Declaration limits the jurisdiction of the Court to disputes relating to treaties or conventions accepted by Persia after the date of the Declaration.

"It is, however, necessary for me to discuss the part of the judgment which relates to the 1933 Agreement.

"This agreement was referred to in clause (c) of the United Kingdom Submission No. 4 as follows:

'The treaty stipulation arising out of the settlement in 1933, through the mediation of the Council of the League of Nations, of the international dispute between the United Kingdom and Persia, the conditions of which settlement are contained in the Concession Convention concluded by the Imperial Government of Persia with the Anglo-Persian Oil Company in that year.'

"The United Kingdom claim on the merits, as set forth in the Application and in the Memorial, relates, in an important part, to breaches of this 'treaty stipulation'. In this part of the case on the merits, the United Kingdom contended, in the Memorial, that the 1933 Concession embodied 'the substance of an implied agreement between the Government of the United Kingdom and the Iranian Government because there was an implied agreement between these two Governments (fully operative as creating an obligation in international law) to the effect that the Iranian Government undertook to observe the provisions of its concessionary convention with the Company'.

"To my mind, the merits of a dispute consist of the issues of fact and law which give rise to a cause of action, and which an applicant State must establish in order to be entitled to the relief claimed. In every dispute which is founded upon the breach of a treaty obligation, the applicant must establish the existence and scope of the treaty, as well as the facts which constitute the breach, in order to justify a tribunal in according the relief which it has requested.

"It is, therefore, clear that the question as to whether such an implied agreement arose between the two Governments in 1933, one fully operative as creating an obligation in international law, is an essential element of the United Kingdom claim on the merits. It is a question partly of fact and partly of mixed fact and law.

"It is equally clear that this question goes to the jurisdiction as well as to the merits.

"It does not follow, however, that, because it goes to the jurisdiction, it can be decided on Preliminary Objection.

"The Statute provides, in Article 36 (6):

'In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.'

"There is nothing in the Statute providing for summary procedure by way of preliminary objection. There can be no doubt that the normal course, contemplated by this article, is that 'the decision of the Court', in disputes as to jurisdiction, should be in accordance with the course of procedure prescribed by Chapter III of the Statute. The exceptional provisions of Rule 62 can only be construed as enabling the Court to deal summarily with those questions of jurisdiction which can be settled without prejudging matters which are a part of the merits.

They cannot possibly be construed as authorizing the Court to decide, in preliminary proceedings, issues of law or fact which are essential elements of both jurisdiction and merits, or which are inextricably linked with the merits of the case. This is undoubtedly the basis of the rule in the *Losinger Case*—Series A/B, No. 67, at pp. 23, 24—and it is confirmed by the instances in which the Permanent Court refused to deal, in preliminary proceedings, with questions of jurisdiction which concerned or were closely related to issues of law or fact that formed part of the merits. Without attempting an exhaustive reference to the jurisprudence of the Permanent Court, reference can be made to three cases in which this course was adopted as a basis for decision: *Prince von Pless*, Series A/B, No. 52, at p. 16; *Pajzs, Csáky, Esterházy Case*, Series A/B, No. 66, at p. 9; *The Railway Line Panevezys-Saldutiskis*, Series A/B, No. 75, at pp. 55, 56.

"It is impossible to overlook the grave injustice which would be done to an applicant State, by a judgment upholding an objection to the jurisdiction and refusing to permit adjudication on the merits, and which, at the same time, decided an important issue of fact or law, forming part of the merits, against the applicant State. The effect of refusal to permit adjudication of the dispute would be to remit the applicant and respondent States to other measures, legal or political, for the settlement of the dispute. Neither the applicant nor the respondent should be prejudiced, in seeking an alternative solution of the dispute, by the decision of any issue of fact or law that pertains to the merits.

"It is for these reasons that I have reached the conclusion that the Court is not competent, in preliminary proceedings and under the relevant provisions of the Statute and Rules, to decide whether or not an international agreement arose between the two Governments in 1933, one fully operative as creating an obligation in international law. I have reached the conclusion that the competence of the Court, at this stage, is limited to deciding whether the alleged international agreement, assuming that the United Kingdom's contention as regards its nature and scope are well founded, is a treaty or convention within the meaning of the Declaration.

"Accordingly, I am compelled to conclude that the aspect of this Objection which relates to the existence and scope of the alleged international agreement should be joined to the merits.

Judge Levi Carneiro in his Dissenting Opinion said, in part:

"... Emphasis has been laid, with a view to excluding any action by the Court, on the strictly private character of the present dispute: it is concerned with a Concession Agreement between the Government of Iran and a British company.

"But it is rather the case that this contract—which the British Government in its Memorial even sought to regard as a sort of international treaty—possesses very considerable interest from an international standpoint; it may be said that it is of international significance.

"I accept the argument of the Iranian Government that this Concession Agreement was neither framed nor approved by the League of Nations or by its Council in 1933. It is, however, the fact that the dispute between the Iranian Government and the British Government in regard to the revocation of the earlier Concession Agreement was brought to the knowledge of the League of Nations, and that the latter manifested an interest in the preparation of the present contract.

"I also admit that, according to statements made by members of the British Government in Parliament, which were brought to the

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knowledge of the Court by the Iranian 'Observations préliminaires' (pp. 33-34), that Government owns a majority of the shares of the Anglo-Iranian Oil Company, and this fact was known to the Iranian Government.

"From another point of view, it is common knowledge that, now more than ever, all questions connected with the extraction of oil provoke certain international reactions, which are all the more pronounced in the case of a country having a geographical situation such as that of Iran.

"In Article 22 of the Concession Agreement of 1933, it was laid down that if the arbitrators appointed by the parties were unable to agree, an umpire was to be nominated by the President or the Vice-President of the Permanent Court. The two Governments—British and Iranian—communicated this provision to the Registrar of the Court (Oral arguments, p. 103).

"Lastly, the Iranian Government laid stress in its statements on the significance of the contract of 1933 as an expression of the political domination exercised by the United Kingdom over Iran, and it described the movement for the nationalization of the oil industry, *i.e. the revocation of that contract*, as a 'national liberation'. I shall show later on, that the measures for nationalization are often of considerable international interest.

"In view of all these circumstances, I do not believe that the Concession Agreement of 1933 can be regarded simply as a private convention, or that the act by which it was cancelled can be regarded as a purely private matter.

"It is true that Article 36, paragraph 2, sub-paragraph (a), of the Statute, only refers to 'the interpretation of a treaty', though it ought to have said 'the interpretation of any international engagement'—which would be more in consonance with the wide terms of sub-paragraph (b) which reads: 'any question of international law'. The wording which I would prefer seems all the more justified when it is borne in mind that sub-paragraph (c) of the same Article 36, paragraph 2, speaks of 'the existence of any fact which, if established, would constitute a breach of an international obligation', and that sub-paragraph (d) speaks of: 'the nature or extent of the reparation to be made for the breach of an international obligation'. If the Court can have jurisdiction in regard to the consequences of an international engagement, how can it be argued that its jurisdiction cannot extend to the interpretation of all international engagements, or that it must in all cases be limited to the interpretation of treaties?

"And if the purpose of the Court's intervention is the legal solution of international disputes, how can such intervention be excluded in a case which threatens international peace, simply because there is no question of the interpretation of an inter-state treaty?

"Since the Iranian declaration recognizes the compulsory jurisdiction of the Court for disputes 'with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia', we might regard the jurisdiction as having been accepted, in the cases referred to, with regard to all 'conventions', provided that they have an international significance—even if they have not been signed by the representatives of the two Governments. The contract of the Anglo-Iranian Company might be regarded as a 'convention' of an international scope—even though it is not itself international—and the dispute that has arisen would then fall within the Court's jurisdiction.

"Such an interpretation of Iran's declaration might, however,

result in giving it a scope wider than that of the jurisdiction of the Court, which is limited by Article 36, paragraph 2; that is to say, the jurisdiction would be extended to the interpretation of any 'international engagement'; this I would regard as desirable, but it is not yet a fact. As the Concession Agreement of 1933 is not a treaty, it follows that the dispute in regard to its execution does not constitute a ground for the Court's jurisdiction. However, I have thought it useful to draw attention to this point because I hope that the Court's jurisdiction will evolve in the direction indicated, by decisions or by legislation. These considerations ought even now to influence the evolution of the Court's jurisprudence.

"3. As it is admitted that the Court's jurisdiction results from the agreement of States, it becomes necessary to determine in what manner Iran accepted that jurisdiction. The scope of the Persian Government's Declaration of October 2, 1930, ratified on September 19, 1932, has been the subject of lengthy arguments.

"On behalf of the Iranian Government, it has been contended that the words '*et postérieurs à la ratification de cette déclaration*' relate to '*traités ou conventions*'. In that case, only disputes arising in regard to situations or facts relating to the application of treaties subsequent to September 19, 1932, would come within the jurisdiction of the Court.

"On behalf of the British Government, it was argued that the words '*et postérieurs à la ratification*' relate to '*situations ou faits*'. According to that interpretation, the Court would have jurisdiction for all disputes, subsequent to the ratification of the Declaration, relating to situations or facts, which were also subsequent to that ratification, in regard to the application of treaties, of whatever date, accepted by Persia.

"Even from a grammatical point of view, reasons were advanced in favour of each of these two conflicting interpretations. True, in the present case, historical and political considerations should be allowed greater weight than points of grammatical interpretation. All the more so because the document in question was perhaps drafted by a person who was not entirely familiar with the niceties of the French language. But it is also true that a number of historical and political arguments were presented in support of each of the respective interpretations.

"From the point of view of international law, the Iranian Government contended that the limitations set forth in the Declaration should not be construed restrictively, because they are matters within the sphere of national sovereignty.

"I regard as more relevant than that argument another which might have been employed against it: namely, that limitations on the terms of Article 36 of the Statute are not authorized—and are even excluded—by that provision of the Statute. In point of fact, Article 36, paragraph 2, allows States to declare that they accept the Court's jurisdiction 'in *all* legal disputes, concerning' the subjects indicated in sub-paragraphs (a), (b), (c), (d).

"The jurisdiction cannot be accepted subject to the exclusion of one or more of these categories. Paragraph 3 of Article 36 of the Statute specifies the only conditions which States may impose, *viz.*, that of reciprocity on the part of one or more States, and of a limitation in time.

"In my opinion, it is impossible to allow any other restrictions or conditions. However, it is a fact that, in practice, other restrictions to Article 36 have been admitted, in the declarations made by different nations. Thus undue facility has been afforded for accepting the Court's jurisdiction—subject to restrictions which make it doubtful

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or open to challenge. The Court cannot ensure the observance of the Statute if it rejects acceptances of its jurisdiction subject to conditions which are not authorized by the Statute. The Persian declaration is itself a good example of the latitude which has been allowed, because it is strictly confined to treaties 'accepted by Persia'—a subjective condition which it is very difficult to appraise. Thus, the Court finds its action delayed and restricted by the terms of these clauses, and by the controversies which they engender as to the extent of its jurisdiction.

" 4. I have sought to ascertain whether the Court's jurisdiction may not rest on some other basis which would avoid the controversy regarding the interpretation of the Iranian declaration; in other words, whether—even if one accepts the Iranian interpretation according to which the Court's jurisdiction is limited to disputes arising from treaties subsequent to September 19, 1932—there is not some other foundation for its jurisdiction in the present case.

" I have refrained from construing the Iranian declaration or determining the scope of the exchange of notes of 1928. Even among the treaties signed by Persia between 1929 and 1937, which are invoked by the British Government, I confined my attention to those which are 'subsequent to the ratification of the declaration', in other words, subsequent to September 19, 1932. That description covers the treaties concluded by Persia with Denmark on February 20, 1934, with Switzerland on April 25, 1934, and with Turkey on March 14, 1937.

" Another instrument which is subsequent to the ratification of the Iranian declaration is the Concession Agreement of April 29, 1933. As I have already observed (paragraph 2), I do not regard it as a treaty, in spite of the circumstances referred to above.

" 5. As a result, I have been able to reduce the controversy to narrow limits: I will admit, *argumentandi gratia*, that the Iranian declaration only accepts the jurisdiction of the Court in respect of treaties subsequent to September 19, 1932. It is therefore necessary to consider whether the treaties with Denmark, Switzerland and Turkey comply with that condition and are applicable to British nationals, and also whether the British Government has reasonable ground for complaining of a breach of the Persian Government's obligation in regard to the treatment of British nationals.

" 6. When reduced to these terms, the question becomes simplified and acquires an added importance, as it involves a doctrinal issue of the highest significance. It does not merely raise the issue whether the Court has, or has not, jurisdiction in the present case. It seeks to determine the rôle of the Court as the guardian of the principles of international law and of the international organization—perhaps even to justify its existence.

" 7. In the Treaty of March 4, 1857, between Persia and the United Kingdom, it was provided, in Article IX, that

'the treatment of their respective subjects, and their trade, shall also, in every respect, be placed on the footing of the treatment of the subjects and commerce of the most-favoured nation'.

" In the Treaty of February 9, 1903, the two Governments agreed (Article II) that the subjects of both countries and their imports into each other's territories

'shall continue to enjoy under all conditions most-favoured-nation treatment'.

" It is interesting to note that in the text of the latter treaty, as published in the Felix Stoerk collection (*Nouveau Recueil général de traités*, 2nd Series, Vol. XXXI, p. 506), the words relating to 'subjects'

which appear in the official publications (*British and Foreign State Papers*, Vol. XCVI, p. 51; *Treaty Series* No. 10) are omitted.

"Subsequently, in a number of treaties—28 XI 1928, 17 II 1929, 9 V 1929, 29 X 1930, 20 II 1934, 25 IV 1934, and 14 III 1937—Iran undertook to grant to the nationals of Egypt, Germany, Belgium, Czechoslovakia, Denmark and Switzerland, and by exchanges of notes at different dates, to the nationals of Turkey, the United States, the Netherlands and Italy, treatment in accordance 'with the principles and practice of ordinary international law', 'as regards their persons and their property'.

"The United Kingdom Government contends that this guarantee is extended to British nationals, in virtue of these treaties and of the most-favoured-nation clause, and that the behaviour of the Iranian Government towards the British 'Anglo-Iranian Oil Company', which gave rise to the dispute which is the subject of the Application, constitutes a breach of general international law.

"It appears to me that, in these circumstances, the dispute comes within the terms of the Iranian Declaration accepting the Court's jurisdiction—even if one admits the interpretation now placed upon it by the Iranian Government. The three treaties—with Denmark, Turkey and Switzerland—which guarantee the observance of international law—were signed in the years 1934 and 1937, that is, subsequently to the ratification of the Iranian declaration.

"8. In spite of the clarity of this conclusion, several weighty objections to it have been put forward. Some of these objections have been abandoned, but this fact, together with the multiplicity of the objections, is striking evidence of the persistence of the efforts to weaken the conclusion submitted.

"In the course of the oral arguments, two objections were put forward. It was contended that the duty of conforming to general international law in the treatment of British nationals did not arise from the Treaties of 1934 and 1937, but from much earlier treaties—the Treaties of 1857 and 1903—which contained the most-favoured-nation clause: the latter Treaties were said to be the principals, the others only accessories. It was further contended that the Act nationalizing the exploitation of oil did not contravene any rule of general international law; in other words, that the Government of Iran, though bound to accord the guarantees of general international law to the British nationals, was not debarred from nationalizing the exploitation of oil, in regard to which it had concluded a contract in 1933 with a British company.

"I am unable to accept either of these two objections.

"9. As to the first objection, it seems to me to be clear that British nationals received from Iran a guarantee of 'the principles and practice of ordinary international law', not by virtue of the old Treaties of 1857 and 1903 which preceded the Iranian Declaration, but as the result of the Treaties of 1934 and 1937, which were subsequent to the Declaration. From this point of view, the principal instruments are the two last treaties, not the two earlier ones. The first two treaties established the most-favoured-nation clause; but this clause, by itself, would not give British nationals the guarantee of 'the principles and practice of international law'. This guarantee they received, by virtue of the most-favoured-nation clause contained in the earlier treaties, when the same guarantee was given to the nationals of Denmark, of Turkey and of Switzerland. This clause operated to enlarge, to extend to British nationals, the concessions granted to other foreigners by the Treaties of 1934 and 1937. This enlargement of the scope of the three later

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Treaties did not take effect, and could not take effect, before the ratification of these Treaties. But these are treaties which are '*postérieurs*', subsequent to the Iranian Declaration. The dispute which arose from the allegation that this guarantee had been violated is thus within the terms of the Declaration, even if one accepts the interpretation put upon it in the present proceedings by the Iranian Government.

"The manner in which a most-favoured-nation clause operates is well known. It does not take effect by itself alone; it operates in due course upon the later treaty which grants some advantage to another nation, and it immediately extends the same advantage to the favoured nation.

"The effect of the clause is, therefore, as Visser has said, complementary. (Ito, *La clause de la nation la plus favorisée*, p. 36). By itself it confers no rights; it can have no application and remains useless. Rights or advantages granted to a third State do not exist, either for the benefit of that State itself or for that of the favoured State before they are expressly conceded. Again, the rights or advantages do not subsist for the favoured State if the concession made to another State should be abrogated. (Raphael A. Farra, *Les effets de la clause*, etc., p. 67; Josef Ebner, *La clause de la nation*, etc., pp. 149-150; Marcel Sibert, *Traité de droit international public*, II, p. 255.) That is, the clause does not have any permanent effect—its effect is merely contingent and is dependent on the continued existence of another treaty the scope of which it enlarges.

"Oppenheim considers it a legal rule, 'but a legal rule the content of which is uncertain, because dependent upon a future event, namely concessions to be granted to third States'. (*La clause de la nation*, etc., p. 26). The clause is merely a conditional guarantee of a future concession, a promise or an engagement to grant to a State or to its nationals the same advantages as are granted or may be granted to other States and to the nationals of other States.

"It can be seen that it was Iran's treaties with Denmark, Turkey and Switzerland, in 1934 and 1937, and not the Treaties of 1857 and 1903 with the United Kingdom, which gave British nationals, in respect of their persons and their property, the guarantee of the general principles of international law. The present dispute relates to the violation of these guarantees, that is to say, it has direct reference to the application of treaties subsequent to the ratification of the Declaration of October 2, 1930. For this reason, even accepting the Iranian construction of this Declaration, the present case is within the Court's jurisdiction. . . ."

[On pp. 158-168, which are not reproduced here, Judge Levi Carneiro dealt with the rules of international law relating to expropriation and nationalization.]

"21. As I have already said, other objections were put forward in addition to the first two which I have mentioned above (paragraph 8). Thus, it has been said that the treaties with Denmark, Switzerland and Turkey were '*res inter alios acta*', so far as the United Kingdom was concerned. But the effect of the most-favoured-nation clause is precisely that of making applicable to a third State, not a party to the later treaty, the provisions of that treaty. It is then no longer *res inter alios*.

"It has been admitted in this case that the three treaties of 1934 and 1937 operated in conjunction with the treaties of 1857 and 1903. This is the only valid argument. It is well founded. But, the issue

nevertheless remains within the terms of the Iranian Declaration because the latter requires (according to the Iranian interpretation) that it should apply 'to situations or facts relating directly or indirectly to the application of treaties . . . subsequent to the ratification'. It cannot be argued—the Declaration does not so provide—that it applies only to 'situations or facts' relating *exclusively* to the application of treaties subsequent to 1932. It is sufficient, therefore, if the facts relate to the application of the treaties of 1934 and 1937, although they may at the same time also relate to the treaties of 1857 and 1903. In the present case the application of the treaties of 1934 and 1937 results 'indirectly' from the operation of the treaties of 1857 and 1903.

"The argument that it was not the intention of the Iranian Government to accept this interpretation of the terms of its Declaration does not suffice to exclude that interpretation. It may be that the Iranian Government did not foresee that this result would follow from the expressions used in the Declaration. That does not matter; the important point is that it is bound by the terms used.

"Similarly, the application of the Declaration by which Iran accepted the jurisdiction of the Court, cannot be excluded by reason of the fact that other treaties preceding the Declaration had been concluded with other nations, which conferred upon British nationals, by virtue of the most-favoured-nation clause, the guarantees of international law, or by reason of the fact that an agreement to the same effect was contained in the Exchange of Notes with the British Government in 1928. These earlier conventions cannot be taken into account if one accepts—as I have done for the purpose of this argument—the Iranian interpretation which requires that the treaties and conventions must be subsequent to the ratification of the Declaration. The important point is that there are three treaties subsequent to that date.

"I therefore reject the argument that the British Government is not entitled to rely on the treaties of 1934 and 1937, on the ground that they already enjoyed this guarantee for the benefit of their nationals, by virtue of the Exchange of Notes which took place in 1928. It is clear that, if one excludes the application of this Exchange of Notes on the ground that it preceded the ratification of the Declaration, the British Government is still entitled to rely on subsequent treaties. The guarantee to observe international law was given to British nationals by Iran, directly by the Exchange of Notes in 1928, and indirectly, by virtue of the application of the most-favoured-nation clause, by ten treaties with other States. In order now to exclude the jurisdiction of the Court, in the face of the violation of this clear and repeated guarantee, the Iranian Government would exclude the application of conventions prior to 1932 by contending that the Declaration accepting the jurisdiction of the Court refers only to conventions of subsequent date; at the same time, the application of conventions subsequent to 1932 is said to be excluded by the fact that the same guarantee had already been given by a treaty prior to 1932. British nationals would thus be in a strange position: they would have the guarantee of the principles and practice of international law which Iran gave in the treaties with several States and in the Exchange of Notes with a representative of the United Kingdom, but they would be unable to invoke it before this Court. The artificiality of this argument is obvious.

"It was also argued that the Treaties of 1857 and 1903, being capitulatory treaties, were revoked as a result of the abolition of the régime of capitulations: the most-favoured-nation clause is said to have disappeared. This argument, however, was sufficiently disposed of by pointing out that Counsel for Iran did not go as far as that and did not

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contest the continued operation of the clause and of Article 9 of the Treaty of 1857 and Article 2 of the Treaty of 1903 in which it is contained.

"It might have been said that these two treaties were not 'accepted by Persia', a condition which, as I have already said, is subjective and difficult of application. I do not think that Counsel for Iran submitted to the Court that these two treaties were affected by this condition. In any event, such a consideration would not justify the exclusion of the most-favoured-nation clause because that clause is justified precisely by the abolition of the capitulatory régime; and this abolition did not bring about the annulment of the clause. The clause is perfectly compatible with the régime of the abolition of capitulations. It was contained in some ten treaties concluded by Iran.

"Another argument was to the effect that the most-favoured-nation clause confers advantages and favours, and that a guarantee to observe the principles of international law is neither. It is obvious that to accept the proposition that the guarantee of the principles and practice of international law is not an advantage, it would be necessary to give to the most-favoured-nation clause a meaning limited to the narrowest possible material interests and benefits.

"Furthermore, it was sought to belittle the scope of this guarantee by describing it as an implicit rule, binding in any event, and arguing that its inclusion in a treaty had no significance. I agree that this should be the case. Respect for the principles and practice of international law is the first duty of civilized nations; without it any international organization is inconceivable. It is not necessary to lay down this rule in a treaty. In any event, it may be considered as being expressly contained in the Charter of the United Nations.

"However, if we are agreed on this proposition, we must still examine the consequences which follow from its acceptance. The first consequence would be to accept the jurisdiction of the Court in all cases in which these principles have been violated, or in which disputes concerning their application have arisen. With the exception of a few opinions of great value, this proposition is not yet generally accepted. The jurisprudence of the Court leans towards a refusal to recognize international obligations which have not been expressly provided for in a special treaty.

"How, then, can it be said that a treaty which creates an express obligation to observe the principles and practice of international law is of no significance, and that this obligation is always implicit?

"The last objection put forward against the application of the most-favoured-nation clause for which the United Kingdom Government contends, is that the Treaties of 1857 and 1903 cannot be invoked because they preceded the ratification of the Iranian Declaration. As I have already pointed out, however, this Declaration, even if the Iranian interpretation be accepted, does not require that the dispute should relate 'exclusively' to the application of treaties subsequent to 1932. The dispute may arise out of the application of a treaty subsequent to 1932 and, at the same time, out of another treaty prior to that date. This applies with greater force where, as in the present case, the earlier treaty only brings about the application of the later treaty. As I have pointed out, the rights of British nationals flow from the Treaties of 1934 and 1937 which are applicable to them by virtue of the provisions contained in the Treaties of 1857 and 1903.

"22. In conclusion, my first impression in this preliminary stage of the proceedings is that there have been very serious violations of the principles and practice of international law, of principles the observance of which had been guaranteed to British nationals in Iran

by three treaties subsequent to the ratification of the Iranian Declaration accepting the jurisdiction of the Court. I would, therefore, overrule the objection to the jurisdiction and hold that the Court has jurisdiction to decide as to the submission of the dispute to the arbitration tribunal, in accordance with the submission contained in paragraph (a) of the Application filed by the United Kingdom.

"I am of opinion that, having regard to this conclusion, the argument of Counsel for the United Kingdom relating to *forum prorogatum* does not arise. The other objections of non-admissibility which were put forward by the Iranian Government would have to be considered later if the Court decided in favour of its jurisdiction. Having upheld the objection to the jurisdiction, the Court cannot deal with the other objections.

"In any event, any further proceedings should be suspended until a further decision by the Security Council of the United Nations."

PART XI

WAR AND NEUTRALITY

A—WAR IN GENERAL

I.—Definition and Technical Meaning of War. Belligerency and Insurgency

Case War—In General—Civil War—Distinction between Civil
No. 115 Commotion, Civil War and International War—Palestine—
Arab-Jewish Hostilities Prior to Termination of Mandate—
Effect of Termination of Mandate and Invasion by Arab
States.

DIAB *v.* ATTORNEY-GENERAL.

Israel, Supreme Court sitting as Court of Criminal Appeals.
(Smoira C.J.; Silberg and Vitkon JJ.)
December 2, 1952.

THE FACTS.—This was an appeal from a conviction under section 53 (*a*) of the Criminal Code Ordinance, 1953, by which “any person who:—without lawful authority carries on or makes preparation for carrying on, or aids in, or advises the carrying on, or preparation for, any war or warlike undertaking with, for, by or against any section, race or body of persons in Palestine (Israel) . . . is guilty of a felony . . .” The marginal note to this section is: “Promoting civil war”.

Diab was born in a village in Lower Galilee. During the time of the Mandate he had served for a short while as a medical orderly in the Transjordanian Frontier Force, and in March 1948, as the Mandate was drawing to its close, he was discharged and returned to his native village. About that time it appears that he volunteered for the “Arab Liberation Army”, an irregular force operating in that district both before and after the establishment of the State of Israel. The village of the accused was occupied by the Israel Army in October 1948. On the happening of that event, the accused remained in his village and was registered under the (Israel) Registration of Inhabitants Ordinance. The lower Court found, on these facts, that, during the relevant period, that is to say, at the end of 1948, Diab was an inhabitant of Israel, living in the said village. At the beginning of December 1948, in the middle of the night, Diab crossed the Israel-Lebanese frontier and re-enlisted in the Arab Liberation Army, in which he served for some six months. On his return to Israel he was

accused under the above section of the Criminal Code Ordinance and was sentenced to seven years' imprisonment.

On appeal against this conviction,

Held: that the fighting between Israel and the Arab States in 1948 was not civil war. The appeal was admitted, and the accused released. The judgment of the Supreme Court was given by Silberg J., who said:

"If the language of section 53 (a) is not as clear as it might be, all doubts are removed by the marginal note, which explicitly states that the intention is to refer to civil war. The question therefore is, what is the precise meaning of that phrase, and what distinguishes civil war from war in the usual sense?

"The answer—which has been adopted also by English lawyers—is to be found not in English precedents but in those of the United States . . ." [The Judge quoted from Stroud's *Judicial Dictionary*, 2nd ed., p. 317, Oppenheim's *International Law*, 6th ed., Vol. 2, p. 173, and from the American cases of *Brown v. Hiatt*, 1 Dillon p. 379, *Juando v. Taylor*, 13 F. Cases No. 7558, and *Underhill v. Hernandez*, 18 S.Ct. 83, and continued:]

"From some points of view, the American precedents take an exceptional attitude towards the American Civil War of 1861-65. The difficulty is that there you did not have two aspirants for power in one State, but one of them, that is to say, the Southern States, wanted to separate itself from the State organism previously common to both parties. From the point of view of the Confederacy, the war was a territorial war against another, foreign, State, but this was not the attitude of the North. In their eyes, the Southerners were rebels, whose object was to upset the existing order and to establish in a part of the State their own illegal system of Government. Since, after four years, the war ended in the victory of the North and the Confederate States were brought back into the fold, the Northern approach has become the only one by which the whole war can be viewed. However, the very fact that the Southern States themselves looked upon the war as a territorial war between States, was full of important legal consequences for the States of the North. In particular, it accorded them the rights which international law grants to all belligerent States. In consequence, the American Civil War came to possess a dual aspect, that of civil war and that of international war."

[The Judge here quoted from *The Amy Warrick*, 64 Federal Digest 245-6, and from *Salisbury Hubbard and Co. v. Harnden Express Co.* and *Mayer v. Reed & Co.*, both cited in 67 C.J. 336 and 337, and continued:]

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“ Summarizing these different definitions, we find that civil war is a war of the citizen against the State, or of citizen against citizen, for the purpose of obtaining power in the whole State or in part of it. The emphasis is on the word ‘ citizen ’, that is to say, civil war always implies an armed struggle by a group of citizenry against the established order or in order to obtain power over its own State, and not a war against another State trying to impose its will over the territory and the citizens of that State, that is to say, a foreign country. This is the legal meaning of the word, and it is also its normal and natural meaning for the general public and for historians. The War of Pompey and Julius Caesar in the first century B.C., the wars of the different Roman successors in the second and third centuries A.D., Cromwell’s revolt in the 17th century, the War of the Bolsheviks against the Provisional Government and later against the White Russians in the present century, all those are termed civil wars by historians, and all of them possess the characteristics contained in the legal definition quoted above. We have never seen this epithet given to external wars between kings or States.

“ Having thus established the legal nature of civil war, let us examine whether the circumstances before us meet its requirements. [After describing the facts as given above, Judge Silberg went on:]

“ The Court below has established that the Arab Liberation Army was an organized army with its own administrative services and chain of command. It is not seriously disputed that at that time it was operating either in connection with, or at least under the general protection of, the Syrian Army, and that when, in February 1949, the appellant was seen in the Lebanon by one of the witnesses, he was wearing military uniform, and that the Syrian Army’s badge was in his cap. The appellant was serving in a company of one Abu Ahmed from Sepphoris, a well-known leader of the Arab bands during the Arab Revolt of 1936, and most of the soldiers of that company were Palestinian Arabs. The company was engaged in warlike operations; it was operating on a section of the Syria-Lebanese front, opposite the Northern frontier, and its general objective was—to quote one of the witnesses—to attack the Jews. On this the prosecution based its charge that the appellant was aiding in the Arab Liberation Army’s war against the Jewish inhabitants of the State of Israel and was thus committing an offence against section 53 (a) of the Criminal Code Ordinance.

“ This argument is basically unfounded, and indirectly and unintentionally it distorts the character of the War of Independence. With all respect to the prosecution, the argument

suffers from lack of proportion and obscures the clear distinction between the riots and commotions of the pre-war period and the warlike character of the struggle itself which commenced on the establishment of the State of Israel. The war of the Arab States against Israel was not civil war but war between independent States on both sides. The aggressors—several Arab States—wanted to blot out the State of Israel entirely. It was a territorial war between States, and it is quite irrelevant that the aggressors (invaders) themselves had not recognized the political existence of the victim of their aggression. Israel was recognized, immediately after the Declaration of Independence, by several Great Powers and was an existing political fact on the international scene. We have never acknowledged that the Arab States came to assist the Arabs of Palestine and that their war aim was to establish an independent Palestinian State within the former mandatory boundaries and under the hegemony of the local Arabs. True, this point of view was put forward by the spokesman of the Arab States in various United Nations organs and in other places, but the truth was otherwise. It may well be that those few units which called themselves the Arab Liberation Army had their own objectives, but they did not determine the war aims, nor did they have any say in the conduct of the war. Their influence was too slight as compared with that of the armies of the seven Arab States. It is, then, not important what the old rebel leader Abu Ahmed from Sepphoris thought in his heart, or what were the political aims of his men. They were, intentionally or unintentionally, tools of the invaders and it was the invaders' aims which were decisive.

"In short, the war between the Arab States and Israel was not civil war within the meaning of section 53 (a) of the Ordinance. Therefore, a person who took part in it against Israel, even though a resident of Israel, cannot be charged under that section.

"I said: 'Cannot be charged under that section'. I did not say: 'Cannot be charged at all'. I am inclined to think that if a person resident in Israel who owes a duty of allegiance towards Israel, takes part in a war against the State of Israel, that person can be charged with treason under section 49 (1) of the Criminal Code Ordinance. That section, in its original (mandatory) form, imposes the death penalty on any person who levies war against His Majesty in order to intimidate or overawe the High Commissioner. In lieu of His Majesty as the bearer of sovereignty and the *jus belligerendi*, there comes now the State of Israel; and in lieu of the High Commissioner as the bearer of authority (and as the object of the war) comes the Government of Israel. . . . These changes leave the essential

Case basis of section 49 (1) as it was. That is to say, the section
No. 115 forbids the levying of war against the sovereign in order to
Contd. intimidate or overawe the established authority in the State. . . .
 The conclusion would therefore be that in a case such as the
 one before us, in which a person resident in Israel, who is
 under a duty of allegiance towards the State, and who does
 not, for that reason, enjoy the exemptions given by inter-
 national law (that is to say, without a duty of loyalty there can
 be no prosecution for treason, see Oppenheim, *op. cit.*, p. 322)—
 that person can be charged with treason under section 49 (1)
 of the Criminal Code Ordinance.”

The Judge pointed out, however, that the Court would not
 substitute this charge for the charge which had been dismissed
 against the appellant owing to the provisions governing criminal
 procedure in Israel. The appeal was therefore granted and the
 conviction dismissed.

[Reports: *Piskei-Din*, 6 (1952), p. 922; *Pesakim Elyonim*,
 5 (1951/2), p. 419.]

NOTE I.—For the view that the disturbances which took place in
 Palestine between December 1947 and May 14, 1948, *i.e.*, from the
 date of the adoption of Resolution 181 (II) of the General Assembly
 of the United Nations and the Declaration of Independence of Israel,
 did not constitute war in the sense of international law, see also
Abramovitz v. Attorney-General, decided by the Jerusalem District
 Court sitting as a Court of Criminal Appeal on June 22, 1950. The
 Court said: “First of all, Counsel for the accused tried to describe
 the situation which existed when the vehicle was sold (on April 18,
 1948) by the Irgun Zvai Leumi¹ as a state of war. He relies on
 international law, according to which a belligerent army is entitled
 to appropriate enemy property. But in fact, war in the sense of
 international law did not exist at that date. True, there was
 fighting between Jews and Arabs, but this fighting was not of such a
 character as to permit us to describe the result as a situation of war.
 It was not a condition wherein two or more States were fighting
 one another, or wherein two or more regular armies were opposed to
 one another. Furthermore, even if it is assumed that there was a
 state of war, there is no proof that the vehicle was enemy property
 in the sense that it was public or State property which alone may
 be appropriated by a belligerent (see Oppenheim, *International
 Law*, Vol. 2, § 137). True, § 141 speaks of private movable property,
 including vehicles of the class with which we are concerned. These
 may be seized by a belligerent army. However, first of all the seizure
 must be for military purposes—and in the present case no evidence
 has been brought to show that the Irgun Zvai Leumi took the vehicle
 in order to use it, or in fact made use of it, for military purposes.
 Secondly, if a belligerent army takes movable private property, it

¹ The Irgun Zvai Leumi (National Military Organization) was one of the
 “dissident” activist Jewish organizations which did not admit the authority,
 before the termination of the Mandate, of the Jewish Agency for Palestine,

is bound to return it after the restoration of peace or pay compensation for it."

[Report: *Pesakim Mehoziim*, 4 (1949-50), 441 at p. 445.]

NOTE II.—As to the position after the signing of the General Armistice Agreements of 1949 (texts in *United Nations Treaty Series*, Vol. 42, pp. 251, 287, 303, 327) see *Yudsin v. Estate of Shanti*, decided by the Tel Aviv District Court on December 9, 1953. The case concerned the necessity for obtaining a licence for a certain transaction from the Custodian of Enemy Property, and the question arose in connection with the discharge of a debt due by the deceased's estate to the plaintiff. The deceased had been resident in the Lebanon which, it was argued, was enemy territory having regard to the state of war subsisting between Israel and Lebanon. In rejecting this argument the Court said: "I do not agree that there was any necessity for a formal declaration that the Arab States, including Lebanon, are enemy States. There is no need for a formal declaration of war in order to create a state of war between two States. The question whether a state of war exists between two States or not is one of fact, and there is no need to prove the existence of war if the matter is one of common notoriety. . . . If war exists between Israel and another State, then the territory of that State is enemy territory, and a person who lives there is an enemy within the meaning of the Trading with the Enemy Ordinance. The question therefore is, does a state of war exist between Israel and Lebanon? That indeed is the argument of the defendant, who relies on the *Diab* case and the Israel-Lebanese General Armistice Agreement. The fact is that on the establishment of Israel the country was attacked by the Arab States, including Lebanon, and the Arab-Jewish war commenced. During a certain period there was a state of war between Israel and Lebanon and it was terminated by the signature of the General Armistice Agreement. However, no Peace Treaty has been signed. Nevertheless, I am not prepared to say that a state of war still subsists between Israel and the Arab States, so that Lebanon is an enemy country within the meaning of the said Ordinance. In my view, in the absence of any declaration of war or other official notice regarding the existence of war with Lebanon, the question is to be decided by reference to the situation in fact; that is to say, had notices regarding the existence of war between Israel and Lebanon, similar to the notices published by the mandatory authorities during the Second World War, been published,¹ then only a notice regarding the termination of the war could lead to the exclusion of Lebanon from the definition of enemy State within the meaning of the Ordinance. If, however, we have regard to the fact that no such notice has been published and that no official declaration of war between Israel and Lebanon has ever been made, then this Court has to establish if indeed a state of war exists. It will do so on the basis of facts, in the same way that the conduct

¹ During the Second World War there were regularly published, in the *Palestine Gazette*, official notices that His Majesty was in a state of war with the different enemy Powers. Such notices constituted judicial notice of the existence of the state of war as between the parties therein named.

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of military operations by the Arab States, including Lebanon, proves the existence of war for a certain period after the establishment of Israel, so the absence of such acts proves that the war no longer subsists. In my view, the war between Israel and Lebanon terminated not later than March 23, 1949, the date of the signature of the General Armistice Agreement."

[Not yet reported. Summary in *Pesakim Mehoziim Tamziot*, II (1954) p. 90.]

V.—Effects of Outbreak of War

ii.—On Treaties

Case
No. 116

War—Effects of Outbreak of—On Treaties.

STRAMAZI *v.* DELLAZOPPA.

France, Court of First Instance of Aix-en-Provence.
July 8, 1952.

THE FACTS.—This was an action on a contract of sale. The plaintiff was an Italian national. The defendant had become French by naturalization. The defendant demanded that the plaintiff, as a foreign national, should be required to give security for costs. Article 31 of the Franco-Italian Treaty of June 3, 1930, concerning the execution of judgments provided that Italian nationals in France should be exempt from the payment of security for costs. The question before the Court was whether that Convention was in force.

Held: that the plaintiff was exempt from giving security for costs. The Franco-Italian Treaty of June 3, 1930, was again in force. The Court said:

"The Treaty lapsed on the outbreak of war. It was again brought into force in application of the Treaty of Peace concluded at Paris on February 10, 1947. . . . Article 44 of that Treaty provided that each of the Allied Powers would, within six months from the coming into force of the Treaty, by notification to the Italian Government, indicate which bilateral Treaties concluded with Italy before the war it desired to keep in force or to revive. The Treaty came into force again on September 15, 1948. On November 14, 1948, the Minister for Foreign Affairs published a list of Franco-Italian Treaties in the *Journal Officiel* in pursuance of that provision. The Treaty of June 3, 1930, concerning the execution of judgments was included in that list. Italian nationals are therefore no longer required to give security for costs."

[Report: *Sirey, Jurisprudence*, 1952, II, p. 184.]

War—Effects of Outbreak of—On Multilateral Conventions—
On Private Contracts—Attitude of Neutral Courts.Case
No. 117TELEFUNKEN *v.* N.V. PHILIPS.

Switzerland, Court of Appeal of Geneva. April 18, 1952.
Federal Tribunal. September 24, 1952.

THE FACTS.—In 1931 the Dutch Company N.V. Philips and the German Company Telefunken concluded a cartel agreement. That agreement contained provisions for arbitration in case of dispute. It was expressly provided that the arbitral tribunal should apply Swiss law and act in conformity with the procedure of the Canton of Geneva. If one of the parties did not appoint its arbitrator, he was to be appointed by the President of the Swiss Federal Tribunal. In 1947 Philips asked Telefunken for a settlement of accounts. No agreement was reached. Philips accordingly appointed its arbitrator; Telefunken failed to do the same. The President of the Federal Tribunal declined to appoint an arbitrator on behalf of Telefunken, on the ground that that Company did not admit that it was bound to arbitrate the dispute. Philips thereupon asked the Court of first instance of Geneva to appoint the arbitrator. The Court, judging by default, did so. Telefunken thereupon appealed to the Court of Appeal of Geneva, contesting the competence of the Genevese tribunals to deal with the case. It further contended that the cartel agreement of 1931, which contained the arbitration clause, had lapsed as a result of the war.

Held (by the Court of Appeal of Geneva): that the appeal must be rejected. The Court said, in part:

“The competence *ratione loci* of the Genevese tribunals follows, *inter alia*, from the Geneva Protocol on Arbitration Clauses, of September 24, 1923, which provides that ‘the arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place’ (Article 2, paragraph 1). The parties have, moreover, implicitly agreed that the Genevese tribunals should take cognisance of any difficulties which Swiss law, which they have made applicable, may refer to the courts. The Genevese courts cannot decline jurisdiction without violating the Geneva Protocol. . . .

“Telefunken contends that the cartel agreement has lapsed and that the arbitration clause no longer binds the parties. According to its Article 205, the agreement terminated on June 30, 1946. But the parties nevertheless remain bound

Case
No. 117
Contd.

by the arbitration clause contained in Articles 206 ff. thereof. It is equally irrelevant, in this connection, whether the agreement was terminated on the outbreak of hostilities between Germany and the Netherlands—as Telefunken contends—or on September 18, 1944, the date of the liberation of the Netherlands—as Philips argues. According to Article 208 of the contract, the arbitrators must apply Swiss law. That law is applicable both to the contract and to the arbitration agreement. According to Swiss law, the fact of war cannot result in the annulment of the agreement, and no account can be taken of the peace treaties which do not yet exist.”

On appeal,

Held (by the Federal Tribunal): that the appeal must be rejected. The Court said, in part:

“The appellant contends that, according to generally accepted principles of international law, the Geneva Protocol, which has been ratified by Switzerland, the Netherlands and Germany, cannot be applied in this case, because between the two last-named countries its application has been suspended since the outbreak of hostilities on May 10, 1940. The fact remains that in relation to Switzerland, which remained neutral, both the Netherlands and Germany remain bound by that Convention. From the point of view of Swiss courts, the parties to the present dispute are ‘subject respectively to the jurisdiction of Contracting States’. The conditions of Article 1, paragraph 1, of the Geneva Protocol are thus satisfied, and that Convention applies. The question whether, in the relations between the two States to whose jurisdiction the parties are subject, the application of the Convention is suspended or not is irrelevant.”

[Report: *A.T.F.* 78 (1952), I, p. 552.]

Case
No. 118

War—Effect on Treaties—Political and Non-Political Treaties—Hague Convention on Divorce and Judicial Separation—Relevance of State of War between Parties to Convention—Whether Convention Applicable to Italian Nationals Domiciled in Luxemburg.

SILVERIO *v.* DELLI ZOTTI.

Luxemburg, High Court of Justice.
January 30, 1952.

THE FACTS.—In a petition for judicial separation filed after the Second World War by an Italian national domiciled in Luxemburg, the respondent wife raised a plea to the jurisdiction of the courts of Luxemburg on the ground, *inter alia*, that the

Hague Convention on Divorce and Judicial Separation, of June 12, 1902, to which both Italy and Luxemburg had been parties, had lapsed as a result of the state of war between the two countries, and that accordingly Article 5 (2) of the Convention, whereby the courts of the domicile of the spouses were competent to exercise jurisdiction over petitions for judicial separation, did not apply. The petitioner contended that the Convention had not lapsed but had only been suspended for the duration of the war between the two countries, and that it had revived after the war.

Held: that the Convention had only been suspended for the duration of the war, and became operative again when the state of war between the two countries ceased, and that the courts of Luxemburg were accordingly entitled to exercise jurisdiction. The Court said:

“The political and military events which have occurred since 1940 are not such as to make this Convention inapplicable as between Italy and the Grand-Duchy. In fact, the Hague Convention is a multilateral treaty and not a treaty of friendship (*sic*). It follows that the war which broke out between the Contracting Parties had the result of suspending the operation of the Convention for the duration of the war, and not of causing the Convention to lapse. Even if a state of war existed between Italy and Luxemburg, the fact remains that this state of affairs came to an end when normal diplomatic relations were resumed, an event which occurred before these proceedings were instituted. Such resumption of diplomatic relations puts an end to the suspension of the operation of treaties. Accordingly, the plea to the jurisdiction is not well founded.”

[Report: *Pasicrisie luxembourgeoise*, Vol. XV, p. 277.]

iii.—On Private Contracts

War—Effect on Contracts—Suspension of Statute of Limitations During—Contrasting Effects of War and Other Legal Disabilities upon Statute of Limitations—Rights of Aliens to Sue. **Case No. 119**

MARCOS *v.* UNITED STATES.

United States, Court of Claims.

February 5, 1952.

July 15, 1952.

THE FACTS.—The plaintiff, a Filipino, filed suit to recover \$594,000, alleged to be the value of cattle requisitioned in 1941-1942 by the United States Army operating in the

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Contd.

Philippines. Defendant moved to dismiss on the ground that the petition was barred by the statute of limitations. While the defendant did not deny that the statute of limitations was suspended in wartime as to persons without access to the courts, it contended that the suspension was lifted as to the Philippine Islands on April 16, 1945, the date on which commercial mail service between the United States and Manila was resumed, and that, by reason of computation from this date, the plaintiff's suit was not timely.

Held (on February 5, 1952): that the defendant's motion must be denied. The Court said:

"Although this Statute does not mention war, we have had occasion in a recent case to consider the effect of war on the Statute of Limitations. In *Standard-Vacuum Oil Company v. United States*, 80 F. Supp. 657, 112 Ct.Cl. 137, remanded on other grounds, 339 U.S. 157, we reviewed the authorities and noted that the outbreak of war by implication suspends the running of the Statute of Limitations in the case of persons to whom the courts are closed or inaccessible. We relied principally upon the case of *Hanger v. Abbott*, 6 Wall. 532, 539, 18 L.Ed. 939, wherein the Supreme Court stated that: 'Absolute suspension of the right, and prohibition to exercise it, exists during war by the law of nations, and if so, then it is clear that peace cannot bring with it the remedy if the war is of much duration, unless it also be held that the operation of the statute of limitation is also suspended during the period the creditor is prohibited, by the existence of the war, and the law of nations, from enforcing his claim. Neither laches nor fraud can be imputed in such a case, and none of the reasons on which the statute is founded can possibly apply, as the disability to sue becomes absolute by the declaration of war, and is a conclusion of law. Ability to sue was the status of the creditor when the contract was made, but the effect of war is to suspend the right, not only without any fault on his part, but under circumstances which make it his duty to abstain from any such attempt.'

"Such a suspension necessarily occurs because of the prohibition in wartime of all commercial dealings and correspondence with persons in enemy or enemy-occupied territories. Likewise, the courts of the United States are closed during the war to the persons within such territories. The purpose of the Statute of Limitations is to bar stale claims which a party has been lax in asserting, but it is not intended to bar claims which war prevents a party from presenting to the court.

"The problem of computing the period of time available

to a claimant to present his cause of action after the war ceases and the suspension of limitations is lifted was not considered in the *Standard-Vacuum* case. However, according to recognized principles of international law, war simply suspends the running of the Statute as of the date of the outbreak of hostilities, (Note) 137 A.L.R. 1454, 1456; and where the cause of action accrues after war has commenced, the claimant is entitled to the full six-year period after the war's end within which to file suit. *Sierra v. United States*, 9 Ct.Cl. 224; *Green v. United States*, 17 Ct.Cl. 174. Where the Statute has begun to run prior to the commencement of war it has been held that the claimant is also entitled to the full statutory period of six years, and that the exact period of the war's duration should be deducted in determining the day on which the bar of limitations arises. *Chuchuru v. Chutchurru*, 10 Cir., 185 F. 2d 62; see *Semmes v. Hartford Insurance Co.*, 13 Wall. 158, 160 20 L.Ed. 490. In *Salvoni v. Pilson*, 86 U.S.App.D.C. 227, 181 F. 2d 615, 618, the Court stated that: 'Statutes of limitations . . . assume that the one to whom an obligation is owed may sue in a court. If he does not avail himself of the opportunity so to do within a stated time his remedy is barred and the matter is put at rest. But if war intervenes so that the remedy indeed does not exist during all of the statutory period, the time thus taken from it is added when the end of the war brings a resumption of intercourse, communication and access to a court.'

" We hold, therefore, that the war with the Japanese merely suspended the running of the Statute, and at the termination of the war the plaintiff, whose claim arose during the period of suspension, was entitled to the full six-year period within which to bring his action.

" The next problem confronting us is to determine the event which terminated the war and brought to a close the period of suspension of the Statute of Limitations. A number of dates and events have been presented for our consideration, in this case, and in the related cases of *Tan v. U.S.*, Ct.Cl., 102 F.Supp. 552; *Francisca De Guia* and *Beatriz B. Palmares*, No. 50342; *Paulino Lorenzo*, No. 50357; and *Raymundo F. Navarro*, No. 50358; this day decided. We shall here discuss the various contentions urged in all five cases with regard to the lifting of the suspension of the Statute. Because the practice of this Court has been to permit the filing of petitions by mail, defendant urges us to adopt April 16, 1945, the date on which commercial mail service between the United States and Manila was resumed. However, this date would be manifestly unjust to some of the claimants who resided on islands other than Luzon, and which were not liberated until a later

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date. Certain of the plaintiffs suggest that December 31, 1946, the date of the President's Proclamation No. 2714, 61 Stat. 1048, 50 U.S.C.A. Appendix, § 601 note, officially declaring a 'Cessation of Hostilities of World War II', should be selected because it has been regarded as marking the termination of the war for many other purposes. Other dates suggested include July 4, 1946, the date of the Philippine Independence, Presidential Proclamation No. 2695, July 4, 1946, 60 Stat. 1352, 48 U.S.C.A. § 1240 note; September 2, 1945, the date of the formal surrender by Japan, 59 Stat. 1733; and V-J Day, August 14, 1945, the day of the Japanese cease-fire order.

"The logical date to select as lifting the suspension of the Statute of Limitations under the circumstances of this case is the day of the formal surrender of the Japanese, September 2, 1945. It was on this occasion that the above-mentioned reasons for suspending the running of the Statute ceased to exist, inasmuch as commercial intercourse by the United States with the Philippine Islands was thereby restored, and likewise, access to this court by all Filipinos once again became possible. In *Green v. United States*, *supra*, 17 Ct.Cl at p. 187, this Court reached a similar conclusion, holding that the suspension of the running of the Statute during the Civil War was lifted at the time the courts of the United States were reopened to inhabitants of the seceded states. More recently, the United States Court of Appeals for the District of Columbia recognized this view in *Salvoni v. Pilson*, *supra*, and held that the Statute commenced to run again, as to persons residing in Italy during the war, on October 2, 1945, at which time the restrictions on business communication between the United States and Italy were lifted. We conclude that plaintiff was entitled and required to present his claim at any time during the period from September 3, 1945, through September 2, 1951; and, as plaintiff's claim was filed on August 14, 1951, it is timely.

"The Court has also considered the question of whether a Filipino may now entertain a suit in this Court. Citizens of the Philippine Republic have been aliens within the meaning of section 2502 of Title 28, 62 Stat. 976, since July 4, 1946, when the Philippine Islands were granted their independence. Section 2502 provides as follows: 'Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their Government in its courts may sue the United States in the Court of Claims if the subject matter of the suit is otherwise within such Court's jurisdiction.'

"Plaintiff alleges that a similar right is granted to citizens of the United States under the provisions of Public Law No.

3083 of the Philippine Legislature, March 16, 1923, 18 P.L. of Philippines 169, which Act continues to be the law of the Philippine Republic. By virtue of section 1 of this Act, the Government of the Philippine Islands consented to be sued 'upon any moneyed claim involving liability arising from contract, express or implied, which could serve as a basis of civil action between private parties'. From an examination of the remaining sections it appears that American citizens are granted the same right to prosecute such claims against the Philippine Government as is granted to the citizens of the Philippine Republic. The admission of American citizens to the Philippine courts with all of the rights of Philippine citizens as against the Philippine Government satisfies the requirements of section 2502, and the fact that the consent of the Philippine Government to be sued is more restricted than the consent of the United States Government to be sued, is not controlling. *Brodie v. United States*, 62 Ct.Cl. 29, 46; *cf. United States v. O'Keefe*, 11 Wall. 178, 20 L.Ed. 131. Plaintiff is, therefore, entitled to maintain this action.

"We conclude that although plaintiff is a Filipino and an alien, he may sue the United States in the Court of Claims because a reciprocal right against the Philippine Government is granted to United States citizens; that although plaintiff's cause of action arose in 1941 and 1942, after the outbreak of hostilities, it was not barred by the Statute of Limitations which was suspended during the war; that the suspension was lifted on September 2, 1945, giving plaintiff six years thereafter to sue; and, that plaintiff's suit, having been filed on August 14, 1951, is timely."

[Reports: 102 F. Supp. 547; 122 Ct. Cl. 641.]

The defendant moved for a rehearing, urging that the relevant statute of limitations provided that all legal disabilities shall give rise to a three-year period following their removal within which to file suit, and that war was a disability within the meaning of this comprehensive language. The United States further argued that the date selected for the lifting of the suspension of the statute should not be that of the surrender of Japan.

Held (on July 15, 1952): that the defendant's motion must be denied. The Court said:

"While war is in the nature of a disability, it has never technically been regarded as a 'legal disability' within either the coverage of the disability provision of this Court's Statute of Limitations or within the general law usage of the term. . . .

"History supplies the principal explanation as to why the

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effect of war on the Statute of Limitations developed independently of the provision for legal disabilities. At the time of the passage of the original English Statute of Limitations in 1623, the common law regarded all debts, contractual rights, and property rights of subjects of nations at war as being canceled and subject to confiscation by the warring Governments. Thus, no reason existed for the inclusion of war within the disability provision of the Statute of 1623, and the law-makers of the day never thought of providing for the collection or restoration of these rights with the return of peace between the belligerents. *Hanger v. Abbott*, 6 Wall. 532, 18 L.Ed. 939; *Greenwald v. Appel*, C.C., 17 F. 140. As the views of the civilized world gradually changed with respect to the conduct of war, the modern day practice evolved to *suspend* absolutely the rights and remedies between citizens of countries at war, so as not to provide aid for the enemy, and to revive the rights and remedies upon the restoration of peace instead of confiscating them. Today it is a firmly established principle of international law that the outbreak of war by implication suspends the *normal operation* of the Statute of Limitations in the case of persons to whom the courts are closed or inaccessible, and this rule extends not only to enemies but also to residents of enemy-occupied countries such as the Philippine Islands. Cf. (Note) 137 A.L.R. 1454, *et seq.*

"As a result of its historical background, the treatment afforded the suspension of the running of the Statute of Limitations occasioned by the existence of a state of war has developed in a manner which materially differs from the treatment afforded to legal disabilities. There are several cogent reasons why courts have seen fit to create and perpetuate these differences. Generally it is stated that the effect of the running of the Statute of Limitations upon a cause of action is to destroy the *remedy* but not the *right*. 34 Am. Jur., Limitation of Actions, § 11. The effect of the legal disability provision of a Statute of Limitations is to restore this *remedy* for a designated period beyond the normal period of limitations. However, the effect of war is to suspend not only the *remedy* but also the *right* to sue as well. The right and the remedy are suspended in *status quo*, and at the cessation of hostilities are restored to the litigant. The result which necessarily would be achieved if war were treated in any other manner is pointed out by the Supreme Court in *Hanger v. Abbott*, *supra*. The Court stated, 6 Wall. at pp. 538 and 542, 18 L.Ed. 939, that:

'Unless we return the remedy with the right the pretence of restoring the latter is a mockery, as the power to exercise it with effect is gone by lapse of time during which both the right and the remedy were suspended.

' . . . Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period.'

" Similar statements are contained in *United States v. Wiley*, 11 Wall. 508, 20 L.Ed. 211; *Levy v. Stewart*, 11 Wall. 244, 20 L.Ed. 86; *Borovitz v. American Hard Rubber Co.*, D.C., 287 F. 368; *Siplyak v. Davis*, 276 Pa. 49, 119 A. 745; cf. *Frabutt v. New York, Chicago & St. Louis Railroad Co.*, D.C., 84 F. Supp. 460, 464.

" Another basis for the difference in the treatment of war and of legal disabilities with respect to the Statute of Limitations lies in the factors which give rise to these conditions. The legal disability provisions of Statutes of Limitations are designed to provide relief from some personal handicap or impediment affecting the individual litigant and preventing him from bringing a timely suit. Such provisions are based on the presumption that the courts are open and that every litigant free of such a handicap will not unreasonably delay in filing suit. If the cause of action accrued to the litigant prior to the occurrence of the disability, the disability affords no relief from the running of the Statute because the litigant has had some period of time prior to the occurrence of the disability within which to file suit. *De Arnaud v. United States*, 151 U.S. 483, 14 S.Ct. 374, 38 L.Ed. 244; *Whitney's Adm'x. v. United States*, 18 Ct.Cl. 19. In order to bring the disability provision into operation, the litigant must be under the disability at the time the cause of action accrues. The effect of the disability provision in many statutes of limitations, and especially in section 2501 of Title 28, is *not to suspend* the running of the Statute during the period that the disability continues, but is to create a designated *additional* period, a period of grace, beyond the normal period of limitations within which to file suit after the removal of the personal defect.

" On the other hand when a suit cannot be filed within the normal period of limitations because of the existence of a state of war, the result is not attributable to any personal defect of the claimant, but rather to the international acts of nations for which all citizens are responsible. A superior power closes the courts to litigation with the enemy during such a period. The effect of the outbreak of war is to *suspend the normal operation* of the Statute of Limitations, and with the return of peace the Statute revives and continues to operate in the normal manner. This result is contrary to the way in which legal disabilities affect the Statute. The legal rule

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heretofore applied to war by English and American courts does not allow the Statute to continue to run during the existence of hostilities, and does not provide an additional period following the end of the war within which to present suits. Instead, the rule simply suspends the Statute in *status quo* as of the time hostilities occur. Thus, if the cause of action accrues after the outbreak of war, the party has the full normal period of limitations after the end of the war within which to sue. If the Statute has begun to run before the outbreak of war, the period during which war lasts is deducted in computing the normal period of limitations. As this position has been consistently followed by the Supreme Court, *Brown v. Hiatts*, 15 Wall. 177, 21 L.Ed. 128; *Semmes v. Hartford Insurance Co.*, 13 Wall. 158, 20 L.Ed. 490; *Braun v. Sauerwein*, 10 Wall. 218, 19 L.Ed. 895; we can conceive of no reason for adopting an inconsistent interpretation in the present action.

"In urging the contention that war is a legal disability giving rise to only a three-year period following the return of peace within which to institute suit, defendant has disregarded the consequences of such a construction upon causes of action accruing prior to the start of war. The case of *Tan v. United States*, D.C., 102 F.Supp. 552, presents an example of such a situation. Plaintiff Tan's cause of action against the United States Army accrued on November 3, 1941, and the Statute of Limitations began to run against it at this time. War broke out in Manila on December 8, 1941. If we were to adopt defendant's contention and were to conclude that war is a legal disability, the outbreak of war would have no effect on an accrued action because, as indicated above, once the Statute has begun to run, intervening legal disabilities do not give rise to an additional period of grace following the removal of the disability within which to bring suit. To reach such a conclusion, we would have to disregard the fact that resort to this court by Filipinos was both impossible and illegal during the period here in question. It is clear that defendant's argument is erroneous and is contrary to the more logical conclusion reached in the leading decisions which have considered this problem. We, therefore, reaffirm the principle adopted in our earlier decision in this case that war, unlike 'legal disabilities', impliedly suspended the normal operation of the Statute of Limitations, and that with the return of peace, plaintiff, whose cause of action accrued after the outbreak of war, had six years within which to file his suit.

"The fact that plaintiff was an 'enemy' under the definitions of the Trading With The Enemy Act, 40 Stat. 411, as amended, 50 U.S.C.A. Appendix, §§ 1-39, does not alter our above-stated conclusions. Rather, we find that Congress

expressly provided in section 8 (c) of the Act that the running of the Statute of Limitations should be suspended in certain designated situations, not herein material, and then concluded as follows:

' . . . *Provided, however,* That nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law.'

" In enacting this provision Congress had before it, as part of the Senate Reports accompanying the bill, a legal memorandum which listed the authorities holding that war suspended the operation of the Statute of Limitations. S.Rept. 111, 65th Cong., 1st Sess., pp. 21, 22; S.Rept. 113, 65th Cong., 1st Sess., pp. 21, 22. In light of the fact that Congress was fully informed of the leading decisions, it is our opinion that Congress did not intend by enacting the Trading With The Enemy Act to alter the existing state of the law, but merely intended, by incorporating section 8 (c) into the Act, to confirm the general principle which suspends the running of the Statute of Limitations against the 'enemy' while that status exists. *First National Bank of Pittsburgh v. Anglo-Oesterreichische Bank*, 3 Cir., 37 F. 2d 564, 567.

" Defendant also argues that the date of the formal surrender of Japan, September 2, 1945, which we selected for the lifting of the suspension of the Statute of Limitations was too remote, and has presented two earlier dates for our consideration. The first of these dates is May 25, 1945, when the Secretary of the Treasury, acting pursuant to the authority vested in him by the Trading With The Enemy Act, *supra*, issued General Ruling 18, 10 F.R. 6170, 31 C.F.R. § 131 (1945 Supp.), which, according to defendant, had the effect of removing the liberated portions of the Philippine Islands from the designation of 'enemy territory.' This, defendant insists, made possible the immediate resumption of normal trade and business intercourse between the United States and the Philippine Islands.

" We are unable to attribute such a far-reaching result to General Ruling 18 for several reasons. In the first place, General Ruling 18 does not purport to remove the Philippine Islands from the designation of 'enemy territory' for the purpose of authorizing trading, but rather, its purpose is to redefine the status of the Philippines with respect to the freezing regulations previously imposed upon certain types of property located therein. Section (a) of the Ruling makes this clear in stating as follows:

' (a) *Status of the Philippine Islands under the freezing*

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regulations. For the purpose of administering the freezing regulations and complying with the provisions thereof:

‘ (1) The liberated portions of the Philippine Islands hereafter shall be included within the term “ United States ” as defined in paragraph B of section 5 of the order and shall not be included within the term “ foreign country ” as defined in paragraph D of section 5 of the order;

‘ (2) Any portions of the Philippine Islands controlled or occupied by the military, naval or police forces or other authority of Japan shall immediately upon liberation thereof be included within the term “ United States ” and shall cease to be included within the term “ foreign country ”.’

“ In the second place, section (a) of the Ruling provides that only the liberated portions of the Philippine Islands are relieved of the operation of the freezing regulations as of May 25, 1945, and that the remaining portions of the Philippines shall be so relieved upon the date of their liberation. Thus, it is apparent that instead of adopting the date of the issuance of General Ruling 18 as urged by defendant, we would have to adopt the very terms of section (a) itself in order to have a basis for which to determine when the lifting of the suspension of the Statute took place. In so doing we would involve ourselves in the complex problem of determining different dates for the lifting of the suspension for the various claimants depending upon which island they resided in. Even defendant is forced to concede that such a decision would impose upon us an impractical and virtually unworkable rule. Moreover, section (b) of General Ruling 18 provides that the status of the individual Filipinos is not affected by the removal of the freezing regulations from the liberated islands, and that unless they are licensed as a generally licensed national in accordance with the Trading With The Enemy Act, they will continue to be deemed nationals of a blocked country. Hence, we might even have to determine when individual litigants were relieved of the operation of this section.

“ Instead of becoming involved in the many refinements which would necessarily follow the adoption of the terms of General Ruling 18 as marking the lifting of the suspension, we believe it is far more desirable to adopt the one date, September 2, 1945, which uniformly marks the restoration of the right of free commercial intercourse, and of access to this Court, to every Filipino in all parts of the several Philippine Islands.

“ The second date which defendant suggests would fulfil the necessary qualifications is July 5, 1945. On this day,

General MacArthur and President Osmena of the Philippines each issued statements officially proclaiming the complete liberation of the Philippine Islands. Philippine Official Gazette, Vol. 41, No. 4, pp. 289-290. Defendant again insists that normal relations between the United States and the Philippines were resumed following this occasion, which is two months prior to the September 2, 1945 date named by us as marking the resumption of these activities.

"While the liberation of the islands appears to have been sufficiently advanced to justify the issuance of such proclamations for political and military purposes, we find that the complete liberation was not accomplished at this time, and that many areas and many persons continued to be subject to the control of elements of the Japanese Army until the Japanese Government formally surrendered to the United States on September 2, 1945. Army General Order 105, November 19, 1945, which defines time limitations for the various Philippine battle campaigns, reveals the true state of affairs existing in the Philippine Islands. This order contains the following statement.

'Note.—Battle participation credit for this campaign may be awarded by the theatre commander to units or individuals who actually engaged the enemy after the closing dates, July 1, 1945, and July 4, 1945, respectively.'

"Furthermore, a complete resumption of commercial intercourse was not possible on July 5, 1945, because the war with Japan continued in other areas of the Pacific theatre of operations with the result that the wartime restrictions on private shipping remained in force and sea lanes remained closed to private traffic. Hence, we repeat our earlier conclusion that the first date which, in the interest of uniformity and fairness to all residents of the Philippine Islands, may be selected for the lifting of the suspension of the normal operation of the Statute of Limitations is September 2, 1945."

[Report: 106 F. Supp. 172.]

NOTE.—Dissenting opinions have been omitted from the above report.

See also *Gonzalez v. United States* (1952), 106 F. Supp. 180; *Mastrocola et Al. v. Acheson* (1952), 105 F. Supp. 580; *Oerlikon Machine Tool Works Buehrle & Co. v. United States* (1952), 102 F. Supp. 417; and *In Re Caravas' Estate* (1952), 40 Cal. 2d 33, 250 F. 2d 593, 596, *International Law Reports*, 1951, pp. 492, 493. And see *Peters v. McKay* (1951), 195 Or. 412, 238 P. 2d 225, *International Law Reports*, 1951, Case No. 152; and *Pass v. McGrath, Attorney-General of the United States* (1951), 192 F. 2d 415, *certiorari* denied (1952), 342 U.S. 910, 72 S. Ct. 302, 96 L. Ed. 681. On the date of the legal termination of war see *Grundstein v. Suburban Motor*

Case *Freight, Inc.* (1952), 92 Ohio Appellate Rep. 181, 107 N.E. 2d 366,
No. 119 370-371, and *Girdler Corp. v. Charles Eneu Johnson & Co.* (1951),
Contd. 95 F. Supp. 713, affirmed (1952), 194 F. 2d 533, 92 P. Q. 291, 341,
International Law Reports, 1951, Case No. 171, and the cases there
 noted.

Case War—Effects of Outbreak of—Contracts with Enemy—
No. 120 Validation by Legislation relating to Enemy Property.

SOCIÉTÉ ANONYME ATELIERS J. HANREZ *v.* OFFICE DES
 SÉQUESTRES.

Belgium, Cour de Cassation.
February 29, 1952.

THE FACTS.—The *Office des Séquestres* (Custodian of Enemy Property) in Belgium had claimed, as enemy property, monies due from the appellant to a German company under a contract concluded between them during the German occupation of Belgium in 1942. It was contended on behalf of the appellant that no money was due since the contract, having been concluded during the time of war with an enemy company, was unlawful and accordingly null and void *ab initio*.

Held: that the appeal must be rejected. The Court said:

“The monies due to the Westbank from the appellant company were sequestered by virtue of Article 1, paragraph 1, of the Law of August 23, 1944. Article 4 of that Law provides for notification to the *Office des Séquestres* of ‘any obligation towards an enemy, whether it relates to money, valuables or any other object’ and of ‘any contracts in which an enemy has any interest whatsoever’. In so doing, its intention was to sequester, for the purpose of establishing an economic pledge in favour of the nation, all sums of money due to the enemy.

“In giving to the State, as a pledge, all debts due to the enemy from contracts concluded with him, the law of August 23, 1944, necessarily recognised the legal existence of such debts. In the higher interests of the Belgian State it thus refused to persons who had contracted with the enemy the right to disavow the debt by relying on the unlawful character of the contract.”

[Report: *Pasicrisie belge* (1952), I, p. 389.]

War—Effects of Outbreak of—On Private Contracts—Attitude of Neutral Courts.

See Case No. 117 (*Telefunken v. N.V. Philips*).

iv.—On Enemy Subjects with regard to

(b) THEIR PROPERTY AND OTHER RIGHTS

War—Effects of—On Enemy Property—Chose in Action— Case
 Charge on Immovable Property Situate in Enemy Territory No. 121
 —The Law of the Netherlands.

NEDERLANDS BEHEERS-INSTITUUT *v.* DOLLS.

Holland, District Court of The Hague.

April 21, 1952.

THE FACTS.—At the time of the coming into force of the Decree on Enemy Property (No. E 133 of October 20, 1944) the defendant, a Netherlands subject, was indebted to a German firm of brewers in the sum of 16,300 Marks at 4 per cent. interest, secured by a "*Grundschild*" for the same amount charged in 1941 upon two premises at Erfurt which were the property of a German limited company which itself belonged, as to 96 per cent., to the defendant. (In German law a "*Grundschild*" differs from a mortgage in that it can remain in existence after the payment off of the loan which it was intended to secure.) The claimant, in its capacity as administrator of enemy property on behalf of the State, asked for a judgment declaring the amount of the loan to be enemy property. The question in issue was whether or not the chose in action came within the definition in Article 3 of the Decree of 1944 of enemy property as "being situated within the Kingdom, being governed by the law of the Kingdom, or being susceptible of enforcement within the Kingdom".

Held: that the claim in question could not be regarded as enemy property.

A foreign, and in particular a German, court could not be expected to apply, or to take into account, legal rules unilaterally laid down by the Netherlands legislator with a view to taking over enemy (German) rights in the interest of the Netherlands State. If the respondent were ordered to pay the amount of his debt to the Beheers-Instituut as "enemy property", he would be unable to prevent his German creditors from enforcing their right against the real property in Erfurt subject to the "*Grundschild*," which was for practical purposes the respondent's own property. The Court came to the conclusion therefore that such a literal interpretation of the Decree on Enemy Property, instead of serving its purpose of enabling Netherlands war damage compensation to be recovered from private enemy assets, would in this case have the contrary result of benefiting the State at the expense of a Netherlands subject.

[Report: *N.J.*, 1953, No. 379.]

vii.—Trading with the Enemy

Case Trading with the Enemy—Involuntary Residence in Enemy
No. 122 Territory—Trading with the Enemy Act, 1939—Whether
 Custodian of Enemy Property has Power of Sale.

VAMVAKAS *v.* CUSTODIAN OF ENEMY PROPERTY AND ANOTHER.

England, High Court of Justice, Queen's Bench Division.
 (Ormerod J.).

February 27, 1952.

THE FACTS.—In 1937 the plaintiff lived at Rafina, a suburb of Athens, with his wife and family, and there carried on the business of a general merchant, which required him to spend much of his time in other European countries, particularly Roumania, where his brother in Bucharest carried on a similar business. In 1937 he arranged that his brother should transfer to his credit at the Westminster Bank, Foreign Branch Office, London, 3,000 gold sovereigns, which were the subject of this action.

In August 1939, the plaintiff contracted to supply 500 horses to the Greek Army, and in consequence went to Bucharest, taking his wife and children with him; he lived there at the brother's house and, until October 1947, spent all his time in Roumania, with the exception of short visits to Greece in October 1939, April 1940, and September 1940. The horse contract was completed by about October 10, 1940, but the plaintiff then concerned himself with the charter of a ship to take petrol from Roumania to the Greek Army and other business.

In October 1940, Italy declared war on Greece. German troops began to gather on the Roumanian frontier, and Germans in civilian clothes began to infiltrate into Roumania. A revolution took place in Roumania in December 1940 and January 1941, which resulted in General Antonescu and the Iron Guard being in control of the country. On February 15, 1941, Roumania was declared to be enemy territory within the meaning of the Trading with the Enemy Act, 1939, and shortly after this the Greek Consulate in Bucharest was closed down. Before the Consul left he advised the plaintiff and other Greek subjects in Bucharest to "lie low". On April 6, 1941, Germany declared war on Greece, and from that date the plaintiff was unable to leave Bucharest and was not allowed to carry on any business. He lived as best he could with his wife and family in two rooms in Bucharest and was in constant fear of arrest. He was imprisoned in August 1941 by the Roumanians for a period of six weeks without any charge being

brought against him, and in 1944 was arrested by the Germans but escaped after six or eight weeks' imprisonment. His evidence was that when Axis troops were concentrating on the frontier in November and December 1940, it would have been suicide to try to get through, but that in any event he was morally obliged to remain in Bucharest, as he had assumed the responsibility for the petrol transaction. From June 3, 1937, to September 30, 1940, he spent a total of only five months in Greece, but it was his business to go backwards and forwards. He did not spend all his remaining time in Roumania, but that country was his "centre of movement". On September 5, 1941, the Westminster Bank made a return to the Custodian of Enemy Property showing that they held the 3,000 gold sovereigns in question on behalf of the plaintiff, whose address was given as Bucharest. On May 22, 1942, the Board of Trade, in pursuance of powers contained in section 7 (1) (b) of the Trading with the Enemy Act, 1939, and in the Trading with the Enemy (Custodian) Order, 1939, made an order vesting the sovereigns in the Custodian of Enemy Property and giving the Custodian power to sell them. On June 19, 1942, the Custodian directed the Westminster Bank to sell the sovereigns to the Bank of England, and this was done for the sum of £5,887 10s. od., the price then ruling. The proceeds of sale were paid by the Westminster Bank to the Custodian and held by him. The plaintiff was able to return to Athens from Roumania in October 1947, and on January 11, 1949, through the Westminster Bank, he applied to the Custodian for the release of his assets. The sum of £5,839 5s. od., the proceeds of the sale of the gold and a small balance on his current account, less certain fees and charges, was paid to his credit at the Westminster Bank, but he was unable to obtain the restoration of his holding of gold sovereigns.

The plaintiff claimed against the Custodian, as first defendant, and the Bank of England, as second defendant, damages for conversion, and against the Bank of England a declaration that on payment of the sum of £5,762 8s. 2d. he was entitled to have delivered up 3,000 gold sovereigns, on the grounds that he was not an enemy nor were the sovereigns enemy property within the meaning of the Trading with the Enemy Act, 1939, and that, in any event, the Board of Trade had no power to include a power of sale in the vesting order. Both defendants denied conversion, and the second defendant denied wrongful detention of the sovereigns; they contended that at all material times the plaintiff was an enemy for the purposes of the Trading with the Enemy Act, 1939, and, alternatively, that if at any material time the plaintiff was not an enemy, he was at all material times believed to be an

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enemy, and both defendants relied on section 7 (3) of the Act.

It was contended for the plaintiff that, though the Trading with the Enemy Act, 1939, defined an enemy as "... any individual resident in enemy territory", the test of whether an individual was an enemy for the purposes of the Act must be whether his residence in enemy territory was voluntary or not. Further, even if the Board of Trade had power to make an order vesting the plaintiff's property in the Custodian, there was no power under the Statute to include in that order a power of sale.

Held: that the claim of the plaintiff must fail. For an individual to be an enemy at common law, it was necessary that he should be voluntarily resident in the enemy territory; but the situation here was quite different from that arising under the Trading with the Enemy legislation, where the principal consideration was the administration in this country of property belonging to persons resident in enemy territory lest that property should be used to the advantage of the enemy. For this purpose, *de facto* residence in the enemy country sufficed. It was held, further, that the Custodian had a power of sale.

Ormerod J. said: "The plaintiff claims from the Custodian and from the Bank of England the return of the sovereigns, or their value, or damages for their conversion, on the following grounds: (1) That he was not an enemy, nor were the sovereigns enemy property within the meaning of the Trading with the Enemy Act, 1939; and (2) that in any event the Board of Trade in making a vesting order under section 7 (1) (b) of the Act had no power to order a sale.

"On the first ground it is contended for the plaintiff that the word 'resident' in section 2 (1) (b) of the Trading with the Enemy Act, 1939, must mean 'voluntarily resident', and as the plaintiff at the relevant time was unable to leave Roumania he could not therefore be regarded as resident in enemy territory, and therefore an enemy within the meaning of the section. It was argued that the Act of 1939 repealed the existing legislation which was contained in the Trading with the Enemy Act, 1914, and the two amending Acts of 1914 and 1916; that the Trading with the Enemy Act, 1914, contained no definition of 'enemy', but in the Preamble of the Amending Act of 1914 'enemies' are defined as 'persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war'. This, said Mr. Diplock, should be construed as meaning nothing more than a statement of the common law definition of the word 'enemy'. In *Porter v. Freudenberg* ([1915] 1 K.B. 857, 869)

Lord Reading includes in his definition of enemy ([1915] 1 K.B. 857, 869) 'a British subject . . . who is voluntarily resident . . . in hostile territory', and this definition has been followed and approved in a number of cases both in the Court of Appeal and in the House of Lords, particularly in *Soufracht (V/O) v. Van udens Scheepvaart en Agentuur Maatschappij (N.V. Gebr.)* ([1943] A.C. 203). It is argued that as the words in section 2 (1) (b) of the Act of 1939 are substantially the same as the words in the Preamble to the amending Act of 1914 they should have the same effect and be construed as meaning 'voluntarily resident'. I cannot accept that contention. There is no doubt on the authorities that at common law an individual to be an enemy in these circumstances must be voluntarily in hostile territory. But the circumstances under which the question of enemy status may arise at common law are substantially different from those arising under the statute. At common law the question most frequently arising is the right or liability of the individual to sue or be sued, whereas under the statute the principal consideration is the administration of property in this country belonging to individuals resident in hostile territory, lest that property should be used to the advantage of the enemy.

"In *In re Hatch* Roxburgh J. says ([1948] Ch. 592, 599): 'As the Trading with the Enemy legislation is legislation which has to be applied and acted on during war and under warlike conditions, it would be surprising if "residence" meant anything more complicated than *de facto* residence, irrespective of circumstances, for it would, in most cases, be impossible to investigate the circumstances during a war'. Mr. Diplock contends that in cases of doubt the Board of Trade may specify the individual concerned as an 'enemy' by virtue of section 2 (2) of the Act, but, in my opinion, that cannot be the object of the sub-section. If it were, it would require to be invoked in a very large number of cases, if not in every case, and would indeed render any other definition of 'enemy' unnecessary. I have come to the conclusion that I should accept the view of Roxburgh J. that 'residence' in this context means '*de facto* residence irrespective of circumstances'. If this be right, then I am satisfied that the plaintiff must be regarded as coming within the statutory definition of 'enemy'. His evidence is that he regarded it as his duty to remain in Bucharest at least until February 1941, when Roumania was declared to be enemy territory, and that afterwards he accepted, no doubt wisely, the advice of the Consul to 'lie low' and not take the risk of attempting to leave the country and return to Greece. It may well be, as he says, that after the declaration of war by Germany on Greece in April 1941, it was impossible for him to

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leave. He was, in my opinion, none the less *de facto* resident in Roumania during the relevant period.

" It is unnecessary, in view of the conclusion to which I have come, to consider whether the Custodian would in any event be protected by the provisions of section 7 (3) of the statute.

" It is further contended on behalf of the plaintiff that even although the Board of Trade had the power to make an order vesting the gold in question in the Custodian, there was no power under the statute to include in that order a power of sale. The power to make vesting orders of enemy property is given to the Board of Trade by section 7 (1) of the statute, which provides that the Board of Trade may by order ' (b) vest in the prescribed Custodian such enemy property as may be prescribed . . . or (c) vest in the prescribed Custodian the right to transfer such other enemy property as may be prescribed, being enemy property which has not been and is not required by the order to be, vested in the Custodian '. ' Enemy property ' is defined by section 7 (8) (a) to be any property for the time being belonging to or held or managed by an enemy or an enemy subject. The plaintiff's contention is that paragraphs (b) and (c) of section 7 (1) are mutually exclusive. The Board of Trade may vest the property in the Custodian but may not at the same time give the Custodian a power of sale, or may, without vesting the property, vest in the Custodian a right to transfer it. Section 7 (1) (d) provides that the Board of Trade may confer on the Custodian such powers, rights and duties as may be prescribed as respects (1) property which has been vested in the Custodian by or under the order, and (2) property of which the right of transfer has been so vested. It is contended by the plaintiff that the powers conferred by paragraph (d) do not extend the powers conferred by (b) or (c), but only provide for such ancillary powers as may be necessary to carry out orders made under (b) and (c) respectively.

" It is interesting to look at the provisions in the earlier statutes. The Trading with the Enemy Amendment Act, 1914, s. 4 (1), provides that ' The High Court or a judge thereof may . . . by order vest in the Custodian any such real or personal property as aforesaid . . . and may by the order confer on the Custodian such powers of selling, managing and otherwise dealing with the property as to the court or judge may seem proper '. The Trading with the Enemy Amendment Act, 1916, s. 4 (1), transfers this power to the Board of Trade. Why, then, should the statute of 1939 limit the powers of the Board of Trade to prescribe a power of sale only in cases where a vesting order has not been made? Mr. Diplock contends that the reason for this is to be found in the decision of Russell

J. in *In re Münster* ([1920] 1 Ch. 268), a case which dealt with the right of the Special Commissioners to assess a Custodian to super-tax as agent or receiver for Prince Münster, an enemy. In dealing with the objection that the Custodian's contention involved the existence of a period of time during which there was no beneficial owner of the property, Russell J. said ([1920] 1 Ch. 279): 'That is quite true, but it is the result of a statute which, in my judgment, causes the beneficial ownership to be and remain in statutory suspense or abeyance during the period in question, during which period the Custodian has certain limited powers of dealing with the property'. This decision was followed in *In re Gourju's Will Trusts* ([1943] Ch. 24), a case concerning the payment to a widow residing in enemy territory of the income of a trust fund in this country. Simonds J. said ([1943] Ch. 29): 'He (the Custodian) does not receive such money as agent for the enemy. He has certain limited powers of dealing with it, but, apart from that, the beneficial ownership is to be regarded as in statutory suspense'.

"Mr. Diplock contends that the effect of these decisions is that once a vesting order is made, the beneficial ownership of the property is in suspense and remains in suspense until the signing of a peace treaty or a general release of enemy property. It is to be noted that *In re Münster* ([1920] 1 Ch. 268) deals with the liability of the Custodian to be assessed to super-tax on the income of enemy property vested in him, and is in no way concerned with the right of the Custodian to sell such property. The case was decided when the Trading with the Enemy Amendment Act, 1916, was in force, and if Mr. Diplock's contention is correct would render section 4 of that Act, so far as it related to powers of sale, of no effect as the Board of Trade would have the power to order a sale of the legal estate only, whilst the beneficial ownership would remain in suspense until the happening of the specified future event.

"In my opinion the true effect of *In re Münster* ([1920] 1 Ch. 268) is that although the beneficial ownership of property vested in the Custodian is in suspense, the power of sale is not thereby altered. On a transfer of the property by the Custodian, the beneficial ownership once again attaches to it, but the purchase price remains in the hands of the Custodian under the same conditions as the property for which it has been transferred, including, of course, the suspension of the beneficial ownership. I do not accept, therefore, the contention that the power of the Board of Trade to prescribe a power of sale has been limited because of *In re Münster* ([1920] 1 Ch. 268), and I do not accept the contention that the Board of Trade may not prescribe a power of sale under section 7 (1) (d), in cases where a vesting order has been made under section 7 (1) (b). In my

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view, the object of section 7 (1) (c) is to give the right to the Board of Trade to prescribe a power of sale in cases where for any reason it is unnecessary or impracticable to vest the property in the Custodian and it is not intended to exclude the right to prescribe such a power of sale when a vesting order is made.

“The plaintiff further contended that even if the Custodian had power to sell the property in question to the Bank of England, the beneficial ownership was still in suspense, and that on a general release of enemy property it would vest in him. This contention was, of course, based on *In re Münster* ([1920] 1 Ch. 268), and in view of the opinion I have already expressed, it is unnecessary for me to deal with the question further.

“It follows, therefore, that there must be judgment for the defendants.”

[Report: [1952] 2 Q.B. 183.]

VI.—Enemy Character

i.—Of Individuals

Case
No. 123

War—Enemy Character—Of Individuals—Persons in Occupied Enemy Territory after Termination of Hostilities—Citizen Resident in Enemy Territory—Right to Sue.

FEYERABEND *v.* MCGRATH, ATTORNEY-GENERAL OF THE UNITED STATES, *ET AL.*

United States, Court of Appeals, District of Columbia Circuit.
May 17, 1951.

THE FACTS.—Appellant sued in the Court below for the return of property vested under the Trading with the Enemy Act. Appellant was a native-born citizen of the United States who had resided in Germany since her marriage to a German national in 1904. The vested property had been inherited from her parents. Summary judgment had been entered for the appellees, and from that judgment the plaintiff appealed.

Held: that since the appellant lacked standing to sue, the judgment of the Court below must be affirmed. The Court said:

“The right to sue under section 9 (a)¹ is extended only to a person ‘not an enemy or ally of enemy’. Enemy, as defined by section 2 (a) is ‘Any individual . . . of any nationality,

¹ Of the Trading With the Enemy Act, 50 U.S.C.A. Appendix.

resident within the territory . . . of any nation . . . with which the United States is at war. . . .’ This includes citizens of the United States. *Salvoni v. Pilson*, 1950, 86 U.S.App.D.C. 227, 181 F. 2d 615, *certiorari* denied, 1950, 339 U.S. 981, 70 S.Ct. 1030; *McGrath v. Zander*, 1949, 85 U.S.App.D.C. 334, 177 F. 2d 649; *United States v. Krepper*, 3 Cir., 1946, 159 F. 2d 958, *certiorari* denied, 1947, 330 U.S. 824, 67 S.Ct. 865, 91 L.Ed. 1275; *Josephberg v. Markham*, 2 Cir., 1945, 152 F. 2d 644. So, even if appellant be, as she claims, a citizen of the United States as well as of Germany (a point we do not decide), she would not for that reason alone be qualified to sue.

“Although admitting continuous residence in Germany since 1904, she attempts to overcome the statutory bar against suits ‘by persons resident within enemy territory’ with the novel contention that at the time of the vesting orders, 1947 and 1948, she was residing in Bavaria, and that this German State ceased to be enemy territory after Germany’s surrender (1945) because of its occupation by American forces. We do not agree with the contention. Bavaria became enemy territory upon outbreak of the war in 1941, and so continues to this day. *Ludecke v. Watkins*, 1948, 335 U.S. 160, 166, 170, 68 S.Ct. 1429, 92 L.Ed. 881. Our army is there, upon enemy soil, to keep victory secure, pending negotiations for a formal peace. See *Salamandra Ins. Co. v. New York Life Ins. & Trust Co.*, D.C.S.D.N.Y. 1918, 254 F. 852, 861, Judge Knox. In *Fleming v. Page*, 1850, 9 How. 603, 615, 13 L.Ed. 276, the Court had before it the status of the port of Tampico while occupied by United States forces during the Mexican war. Chief Justice Taney, speaking for the Court, said: ‘While it was occupied by our troops, they were in an enemy’s country, and not in their own; the inhabitants were still foreigners and enemies. . . .’

“It is clear, therefore, that the mere cessation of the fighting in Germany, and occupation of Bavaria by United States forces did not change the status of that state as ‘enemy territory’. Furthermore, the Act itself, section 2, defines ‘end of war’ as the ‘date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date. . . .’ Obviously, therefore, without any such proclamation, a state of war still exists and Bavaria continues to be enemy territory within the meaning of the Act.”

[Report: 189 F. 2d 694.]

NOTE.—See also *Orme v. Northern Trust Co.* (1951), 410 Ill. 354, 102 N.E. 335, where the Court sustained the vesting of alien enemy property after the end of hostilities. For a discussion of the Trading With the Enemy Act, and a holding that “Without doubt, any property in this country of an enemy national may be summarily

Case reduced to possession by the United States in the furtherance of the
No. 123 war effort, and under the war power such enemy-owned property
Contd. may be confiscated or vested in the national Government", see
Todeva v. Oliver Iron Mining Co. et Al. (1951), 232 Minn. 422, 45
 N.W. 2d 782.

Case War—Enemy Character—Of Individuals—Effect of War on
No. 124 Enemy Subjects with Regard to their Property—Property of
 Enemy Subject Long Resident in United States and Detained
 Involuntarily in Enemy Country during War—The Law of
 the United States of America.

GUESSEFELDT *v.* McGRATH.

United States, District Court, District of Columbia.

March 14, 1950.

Court of Appeals, District of Columbia Circuit. May 3, 1951.
Supreme Court. January 28, 1952.

THE FACTS (in part from the decision of the District Court).
 —“Plaintiff was born in Germany in 1870 and moved to
 Hawaii in 1896, where he has since resided. In April 1938
 plaintiff, accompanied by his wife and daughter, who is a
 citizen of the United States, left Hawaii for a trip to Germany.
 Permits were issued to them to re-enter the United States,
 which permits, as extended, expired in March 1940. Following
 the outbreak of World War II in September 1939, plaintiff
 and his family were unable to secure return passage to Hawaii
 within the period referred to in said re-entry permits. On the
 contrary they were compelled to remain involuntarily in
 Germany during hostilities. Plaintiff's daughter returned to
 the United States in January 1947, but plaintiff and his wife
 were unable to return until July 1949. During his enforced
 stay in Germany, plaintiff did not own property of any kind
 there, purchased no war bonds or other securities, did not
 vote in any elections, did not engage in any efforts directly
 or indirectly in aid of or assistance to the war effort of Germany
 or of any enemy or ally of an enemy of the United States, nor
 was he ever directly or indirectly employed by or in the service
 of any government which was an enemy of the United States
 and never committed any act hostile or inimical to the interests
 of the United States.”

Plaintiff's entire estate was in the form of a trust of which
 an Hawaiian Bank was trustee, and this trust estate had been
 vested in the Alien Property Custodian under the Trading with
 the Enemy Act, 50 U.S.C. App. section 1 *et seq.* Plaintiff
 brought this action to recover this property, contending that
 he was not an “enemy”, and relying on section 9 (a) of the
 Act, which reads in part as follows:

“ Any person not an enemy claiming any interest, right or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, . . . may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said Custodian shall require; . . . [S]aid claimant may institute a suit in equity in the Supreme Court of the District of Columbia [now the District Court of the District of Columbia].”

The Government contended, however, that plaintiff was barred by section 2 of the Act, which defines “ enemy ” to include “ Any individual . . . of any nationality, resident within the territory . . . of any nation with which the United States is at war . . . ”, as well as section 39 which provides that “ No property or interest therein of Germany, Japan, or any national of either such country vested in . . . the Government . . . shall be returned to former owners. . . . ”

The plaintiff moved for summary judgment on the pleadings, and the defendant moved to dismiss.

Held (by the District Court): that the defendant’s motion to dismiss must be granted. Although the plaintiff’s involuntary detention in Germany kept him from being an enemy by reason of being a “ resident ” in Germany, he was nevertheless still a national of Germany and so barred by section 39 of the Act. On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed.

On further appeal (by way of *certiorari*),

Held (by the Supreme Court, Vinson C.J., Reed and Minton JJ., dissenting): that the judgment must be reversed. The Court said:

“ The first question to be decided is whether the claimant was ‘ resident within ’ the territory of a nation with which this country was at war within the meaning of sections 2 and 9 (a) of the Trading with the Enemy Act. He was physically within the enemy’s territory. He contends, however, that the meaning conveyed by ‘ resident within ’ is something more than mere presence; at the least a domiciliary connotation, if not domicile, is implied.

“ Legislative history leaves the meaning shrouded. Some use of the term ‘ domicile ’ as the touchstone of enemy status is to be found in the Congressional hearings and reports. But on the floor, Representative Montague, one of the managers of the Bill, unequivocally stated under close questioning that

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the statutory language was intended to cover much more than those domiciled in enemy nations. Yet prisoners of war, expeditionary forces and sojourners were not, he said, intended to be included. 55 Cong. Red. 4922.

"Guessefeldt retained his American domicile. Moreover, if anything more than mere physical presence in enemy territory is required, it would seem clear that he was not an 'enemy' within the meaning of section 2. His stay before the war, as a matter of choice, was short. The circumstances negative any desire for a permanent or long-term connection with Germany. He intended, and indeed attempted, to leave there before this country entered the war. Being there under physical constraint, he is almost literally within the excepted class as authoritatively indicated by Mr. Montague.

"Guessefeldt has the further obstacle of section 39 to clear before he can succeed. Congress in 1948, so the Government's argument runs, adopted a 'policy of nonreturn' and prohibited the restoration of vested property to a 'national' of Germany. A citizen is a national, and Guessefeldt is a German citizen. Thus, even though he may, before the enactment of section 39, have been entitled to bring suit as a non-enemy under section 9 (a), that privilege has since been cut off. To which Guessefeldt counters that section 39 must be construed harmoniously with section 9 (a); the term 'national' in the new section must accordingly be taken to mean only those German and Japanese citizens who could not theretofore have enforced the return of their property as of right. Section 39, in the context of its legislative history and in the light of the scheme and background of the statute, makes the Government's contention unpersuasive.

"It is clear that the Custodian can lawfully vest under section 5 a good deal more than he can hold against a section 9 (a) action. *Central Union Trust Co. of New York v. Garvan*, 254 U.S. 554, 41 S.Ct. 214, 65 L.Ed. 403; *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 68 S.Ct. 174, 92 L.Ed. 880 [*Annual Digest*, 1947 Case No. 91; see also *Uebersee Finanz-Korporation, A.G. v. McGrath*, Case No. 126 in this volume.] Thus Congress had to make provision for the disposal of two classes of vested property. Nonenemy property, lawfully vested under section 5, was recoverable in a suit against the Custodian. Section 9 (a); see *Becker Steel Co. of America v. Cummings*, 296 U.S. 74, 56 S.Ct. 15, 80 L.Ed. 54. The second class, property owned by 'enemies' and therefore not subject to recovery under section 9 (a), was reserved for disposition '[a]fter the end of the war . . . as Congress shall direct.' 40 Stat. 411, 423, 50 U.S.C. App. section 12, 50 U.S.C.A. Appendix, section 12.

"After both wars, Congress did adopt measures to dispose

of this property. The Treaty of Berlin, 42 Stat. 1939, 1940, at the end of World War I, confirmed the possession of vested enemy property by the United States. *Junkers v. Chemical Foundation, Inc.*, D.C., 287 F. 597; *Klein v. Palmer*, 2 Cir., 18 F. 2d 932. For present purposes it does not matter whether this action was taken simply to secure claims of American citizens against Germany or was regarded as the rightful withholding of spoils of war. In the Settlement of War Claims Act of 1928, 45 Stat. 254, 270, 50 U.S.C. App. sections 9 (b) (12), (13), (14), (16), 9 (m), 50 U.S.C.A. Appendix, section 9 (b) (12-14, 16), (m), Congress provided for the return to admittedly enemy owners of 80 per cent. of their vested property. See *Cummings v. Deutsche Bank and Disconto-Gesellschaft*, 300 U.S. 115, 57 S.Ct. 359, 81 L.Ed. 545. Section 32 of the Trading with the Enemy Act, 60 Stat. 50, as amended, 50 U.S.C. App. (Supp. IV, 1946) section 32, 50 U.S.C. Appendix, section 32, enacted after World War II, provided for administrative returns of property to certain classes of 'technical' enemies who were ineligible to bring suit under section 9 (a). Thus, if section 39 is treated as dealing only with property not otherwise subject to recovery, the consistency of the pattern of enactment is preserved. On the other hand, if the significant language of the section is regarded as requiring the retention of property which would otherwise be recoverable in a suit under section 9 (a), it would mark the first departure from what appears to be a heretofore consistent Congressional policy.

"Section 39 was passed as part of a measure establishing a commission on the problem of compensating American prisoners of war, internees and others who suffered personal injury or property damage at the hands of World War II enemies. Congressional attention was focused on the nature and extent of these claims and methods of adjudicating them. The issues involved in section 39 were of peripheral concern. Reading the legislative history in this light, it lends support to the view that section 39 was conceived as dealing with property not otherwise subject to return. Senate hearings opened with detailed testimony analyzing the value of assets which would be left after payments for administration and liquidation, returns under section 32, and disbursements in satisfaction of judgments in suits brought under section 9 (a). Hearings before a Subcommittee of the Senate Committee on the Judiciary on H.R. 4044, 80th Cong., 2d Sess. 12-21. See also *id.*, at 44, and Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 873, 80th Cong., 1st Sess. 264. It seems clear that the legislation looks to the disposition of this fund, and the conclusion is reinforced by the provision of the section that 'The net proceeds remaining

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upon the completion of administration, liquidation, and disposition pursuant to the provisions of this Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date'.

"The tenor of the hearings demonstrates no purpose to change the existing scope of section 9 (a). The only reason a proviso to that effect was not included in section 39 as passed seems to be an assumption—unwarranted in the light of other evidence before the committees discussed below—that a national of any enemy nation had no rights under section 9 (a) in any case. Indeed, the terms 'enemy', 'enemy alien', 'enemy national', and 'German or Japanese national' are used interchangeably in the hearings, not only by committee members but by witnesses from the Office of Alien Property, without regard to precise shades of meaning in the context of the Trading with the Enemy Act.

"By section 39 Congress was manifesting its 'firm resolve not to permit the recurrence of events which after the close of World War I led to the return of enemy property to their former owners'. H.R.Rep. No. 576, 80th Cong., 1st Sess. 2. Those events, as we have seen, culminated in the Settlement of War Claims Act of 1928 permitting enemies as defined in section 2 of the Trading with the Enemy Act to recover 80 per cent. of their vested assets. The major controversy on section 39 was whether this reversal of post World War I policy was justifiable as a matter of international law or appropriate as a course of action for the United States. Opponents of the section considered the 'policy of nonreturn' as applied to admitted enemies illegal, or at least unjust, confiscation of private property. To this point—and not to the issue before the Court in this case—were directed the references in the reports, H.R.Rep. No. 576, 80th Cong., 1st Sess. 2, and debate, 94 Cong. Rec. 550-551, on which the Government relies.

"On the other hand, both Senate and House committees had before them testimony calling attention to the very problem now in issue. Hearings before the House Committee on Interstate and Foreign Commerce, *supra*, at 265; Hearings before a Subcommittee of the Senate Committee on the Judiciary, *supra*, at 197, 254. And one witness presented a draft substitute for the section complex to be sure, which would expressly have saved cases like Guessefeldt's from the operation of the bill. *Id.*, at 233-236. This suggestion was not acted upon by the committee. Yet taken as a whole, the testimony on this issue was meagre and unimpressive. It was largely in written form, and therefore less likely to have been seen by or to have had impact on the committee members or to reflect their views. These considerations, taken together with the

peripheral character of view, the consistent failure to appreciate the technical significance of the term 'enemy national' in the framework of the Act and the fact that the matters raised by this testimony were not touched upon in floor debate—all go far to overcome any presumption that the claimant's situation was considered by Congress and rejected.

"Moreover, a decision for the Government would require us to decide debatable constitutional questions. In suits by United States citizens, section 9 (a) has been construed over the Government's objection, to require repayment of just compensation when the Custodian has liquidated the vested assets. *Becker Steel Co. of America v. Cummings*, *supra*; *Henkels v. Sutherland*, 271 U.S. 298, 46 S.Ct. 524, 70 L.Ed. 953; see *Central Union Trust Co. of New York v. Garvan*, *supra*, 254 U.S. at p. 566, 41 S.Ct. at p. 215; *Stoehr v. Wallace*, 255 U.S. 239, 245, 41 S.Ct. 293, 296, 65 L.Ed. 604. Such a construction, it is said, is necessary to preserve the Act from constitutional doubt. It is clear too that friendly aliens are protected by the Fifth Amendment requirement of just compensation. *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 51 S.Ct. 229, 75 L.Ed. 473. The question which remains is whether a citizen in Guessefeldt's position of a nation with which this country is at war is deemed a friendly alien. More broadly, is any national of an enemy country within the reach of constitutional protection? The thrust of the Government's argument is that section 39 bars any such claimant on the mere showing of his citizenship. *Ex parte Kawato*, 317 U.S. 69, 63 S.Ct. 115, 87 L.Ed. 58, holds that as a matter of common law as well as interpretation of the Trading with the Enemy Act, a resident enemy national, even though interned, must be permitted access to American courts. And *The Venus*, 8 Cranch, 253, 3 L.Ed. 553, seems to say that at common and international law, in the absence of hostile acts, enemy status at least for the purpose of trade, follows location and not nationality. Cf. *Miller v. United States*, 11 Wall. 268, 310-311, 20 L.Ed. 135.

"On the other side is Mr. Justice (then Judge) Cardozo's careful opinion in *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185, 11 A.L.R. 166, holding that a national of an enemy country, wherever resident, is an enemy alien and that any mitigation of the rigours of that status, as in the right to sue, is a matter of grace. He suggests, however, that 'enemy alien' for the purpose of trade with the enemy may be something different than for other purposes, but he had, of course, no occasion to consider whether this difference attained constitutional dimensions. In *Klein v. Palmer*, *supra*, a suit by two resident German citizens, one proclaimed a dangerous enemy alien during World War I, against the Alien Property Custodian

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for damages and equitable relief, Judges Hough, L. Hand and Mack held that 'the Government was under no constitutional prohibition from confiscating the property of the enemy's nationals, whether resident or non-resident.' *Id.*, 18 F. 2d at p. 934. It was the Court's view that the class of nonenemies for the purpose of section 2 of the Trading with the Enemy Act was broader than the class entitled to just compensation under the Fifth Amendment.

"Certainly, the constitutional problem is not imaginary, and the claim not frivolous which would have to be rejected to decide in the Government's favor. Considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited.

"The concern of the Trading with the Enemy Act is with problems at once far-reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a make-shift patchwork. Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes. *Cf. Clark v. Uebersee Finanz-Korp.*, *supra*; *Markham v. Cabell*, 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165; *Silesian-American Corp. v. Clark*, 332 U.S. 469, 68 S.Ct. 179, 92 L.Ed. 81 [*Annual Digest*, 1947, Case No. 88].

"None of the considerations we have canvassed standing alone is conclusive in favour of the claimant. Perhaps none, by itself, would justify a decision in his favour. The cumulative effect, however, places such a decision well within the bounds of reasonable construction. We have said enough to show that the question is not free from doubt. On the balance, however, we think section 39 is properly construed as applying only to those German and Japanese nationals otherwise ineligible to bring suit under section 9 (a).

"The judgment below is reversed."

Vinson C.J., dissenting with Reed and Minton JJ., stated:

"I dissent because I would read section 39 as it is written. That section plainly forbids return of vested property to 'any national' of Germany or Japan. Petitioner is a German citizen and the Court itself concedes that a German citizen is a German national. 342 U.S., 72 S.Ct. 345. Yet the Court permits return of property to petitioner, limiting the application of section 39 to *some* nationals, namely those nationals who are also 'enemies' as the term is defined in section 2 (a) of the Trading with the Enemy Act.

"The term 'national' has also been given legislative definition. 'National' is defined as including 'a subject, citizen or resident of a foreign country' in Executive Order No.

8389, a regulation 'approved, ratified, and confirmed' by Congress in 1941. The Court applies section 38 by reading out the term 'national' and inserting the term 'enemy' as defined in section 2 (a). Since it is apparent on the face of the statute that Congress in no wise chose to assimilate these two clearly defined terms, the Court should not."

[Reports: 89 F.Supp. 344; 191 F. 2d 639; 342 U.S. 308, 72 Sup. Ct. 338, 96 L.Ed. 342.]

NOTE.—After remand to the District Court for trial, the Court held that the evidence showed that the plaintiff had in fact been a "resident" of Germany during the war within the meaning of section 2 of the Act, and dismissed the complaint.

The Court of Appeals affirmed: 213 F. 2d 24.

The opinion of the Supreme Court is noted in *Albany Law Review*, 16 (1952), p. 320; *American Bar Association Journal*, 38 (1952), p. 501; *Annual Survey of American Law*, 1952, p. 14; *Catholic University Law Review*, 2 (1952), p. 123; *American Journal of International Law*, 46 (1952), p. 553.

Enemy Character—Of Nationals—Refusal of Entry Visa on Security Grounds—Intercourse with the Enemy—*Locus standi in judicio*—Arab of Palestinian Origin Residing in Lebanon—Lebanon and Israel—Lebanon as Enemy State. Case No. 125

HAKIM v. MINISTER OF THE INTERIOR.

Israel, Supreme Court sitting as High Court of Justice.

(Cheshin, Assaf and Zussman JJ.).

July 7, 1952.

THE FACTS.—The applicant for an order of *mandamus*, and her family, were Arabs resident in Israel. One of the applicant's sons was a student of the American University of Beirut from the year 1944 and frequently visited his mother, particularly during the vacation. In September 1947, he returned from Palestine to Lebanon legally. In the summer of 1950 he returned illegally to Israel, and after he was caught he was returned to Lebanon. In 1951 he completed his studies, and his mother submitted a number of applications to the Ministry of Immigration for permission for him to return. These requests were not granted and the present proceedings were instituted by the mother for an order calling upon the respondent to show cause why an entry visa into Israel should not be given to the son and why he should not be permitted to reside in Israel permanently.

Held: that the *order nisi* must be discharged. Although the son had formally been a Palestinian citizen and was legally residing abroad, he could not now be regarded as an Israel

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citizen entitled to return to Israel and reside there permanently. The Court said (*per* Cheshin J.):

"The principal argument of Counsel for the applicant was that the son was a Palestinian citizen who was temporarily resident abroad for lawful purposes and since, after the establishment of the State of Israel, he became automatically an Israel citizen, by virtue of section 15 (d) of the Law of Administration Ordinance, 1948 (by which ' " Palestine " wherever appearing in any Law, shall henceforth be read as " Israel " ') the respondent is legally bound to permit him, as a citizen, to return to Israel.

"This argument raises a number of serious constitutional questions, such as the extent of the civic rights of the citizen when he is abroad and the legal validity of the citizenship and immigration laws enacted in the period of the Mandate in the light of the modifications which may result from the establishment of the State and its authorities. However, before discussing these aspects we should first consider the principal answer of Mr. Kokia, Counsel for the respondent, because if that argument is accepted, then there is no point in considering the other arguments. Mr. Kokia argued that the applicant has no *locus standi* in this case since the son on whose behalf the application is brought is today residing in an enemy country, and it is clear from information in the hands of the authorities that his entry into Israel would be prejudicial to the safety of the State.

"This argument requires the most careful consideration. It is well known that when a court has to determine the scope and extent of the civic rights of a person, it does not, generally speaking, have to take into account his nationality, but his place of residence. For this reason it happens that, on account of a person's place of residence, he may, technically speaking, be considered as an enemy." [The Judge here quoted from p. 869 of Lord Reading's speech in *Porter v. Freudenberg*, [1915] 1 K.B. 857, and went on:] "I do not intend to lay down that the rule applied in that case is binding on us in the present circumstances, but it seems that the principle upon which the rule was built can guide us when we have to decide the extent to which the courts are able to give effect to the civic rights of an individual in the position of the applicant's son.

"For the purposes of argument and without laying down any rule of law, I am prepared to assume that the applicant's son was a Palestinian citizen during the period of the Mandate and became an Israel citizen after the establishment of the State. Nor is it disputed that during the War of Independence between Israel and the Arab States, and for several years preceding and following that, he was resident in a State which

made war on Israel. Even though his place of residence was temporary—although its temporary character has already lasted a long time, since 1944—nobody forced it on him. It is true that, from the technical point of view, Lebanon is not an enemy country although in fact it has adopted an attitude of unconcealed hostility towards Israel and has made various alliances with other like-minded States directed towards its utter destruction. Lebanon has not recognized Israel to this very day. Why should it not be regarded, then, as an enemy State? And if that is so, why should its inhabitants not be regarded as alien enemies in accordance with the principle of *Porter v. Freudenberg*?

“ I wish to stress one other factor which no court, and least of all a High Court of Justice, can ignore, and that is the attitude adopted by the applicant's son towards the State of Israel from the point of view of the respondent. In an affidavit filed on behalf of the respondent it is stated that in the opinion of all those who have dealt with the matter the applicant's son is a danger to the peace of the State. The Head of the Visa Department of the Ministry of Interior gave evidence before us to the effect that the competent authorities examined the application with the greatest care before they reached the conclusion that on security grounds the son is not a person to whom an entry visa ought to be given. From this, and other, evidence I am satisfied that the application has been properly considered and that it has not been rejected arbitrarily or maliciously. In such circumstances is this Court obliged to accede to the application, and order the respondent to reverse himself?

“ In order to answer this question, I may return to *Porter v. Freudenberg*. In his speech in that case, Lord Reading described the historical evolution which underlies the principle of a stop to all commercial intercourse with an enemy State and reached the conclusion that the public welfare requires the prohibition of any activity likely to be of benefit to the enemy and to assist it in maintaining its ability to carry on the war. During every war each State tries to hinder the trade of its enemy, to destroy its natural resources, and to appropriate its property. For this reason, trade between the citizens of the two States is forbidden, for continuation of trade relationships is likely to assist the enemy. If that is so regarding commercial intercourse and the transfer of monies and material to the enemy in time of war, how much more is this so in connection with the entry of persons whose attitude to the State is one of hostility and who are likely, in the opinion of the responsible authorities, to be a direct danger to the security of the State and to assist the enemy? In *Hussein and Another v. Minister of the Interior, Piskei Din*, 5 (1951) 1386 at p. 1392, this Court

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said that it would not compel any civil authority to do anything on behalf of a person if such action would prevent the military authorities from taking necessary steps against that person for his having endangered the peace of the State. Our army is engaged in defending the frontiers against outside enemies. Because of its apprehensions regarding the security of the State, it is not prepared to recommend permission being granted to the applicant's son to enter Israel, and when it recently caught him inside Israel, it returned him to Lebanon. In the light of the principle laid down in *Hussein v. Minister of the Interior* and on the basis of *Porter v. Freudenberg* this Court will not order the respondent to perform an action likely to endanger the defence and security preparations of the State which the Army is responsible for carrying out. . . . For these reasons I hold that the order *nisi* should be discharged and that it is not necessary to consider the other arguments."

Per Zussman J.: "I, too, am prepared to assume—without being decisive—that the applicant's son is a citizen of Israel but I am not inclined to think that the principle laid down in *Porter v. Freudenberg* deprives the applicant of *locus standi* in this Court merely because her son resides in an enemy country. Why is a person freely resident in enemy territory deprived of capacity to bring a claim in Court? In defining the meaning of the term 'enemy' on p. 867, Lord Reading stressed that his words related to civil rights and obligations, that is to say, to claims between two individuals. It was there explained that the implementation of the rights of a person residing in enemy territory would be liable to assist the enemy Government, and that the payment of a debt due to that person would in some circumstances be a criminal offence. The procedural incapacity only follows the material law, which postpones the implementation of the rights until after the termination of hostilities.

"In the present case we are not concerned with the legal rights between two citizens, but with a dispute entirely governed by public law. That being so, the Court will not refuse to grant relief to the applicant unless it be established that the material rules of public law do not recognize the continued existence during a time of war of the rights in question, similarly to the attitude of civil law. Support for this view can be found in the practice of the English Prize Court. In so far as the substantive law grants rights to the enemy even in time of war, the Court will not deprive him of his *locus standi*. See *The Moewe*, [1915] P. 1, at p. 15. But in so far as the enemy is not entitled to realize his rights in war time, then he will have no *locus standi*; see *The Glenroy* (*Annual Digest*, 1943-1945, Case No. 123).

"In time of war, the legal bond between a State and its citizens, even when they are residing in enemy territory, is not broken. The duty of allegiance thus continues to exist: *Joyce v. Director of Public Prosecutions* (*Annual Digest*, 1948, Case No. 31), and in return the State is obliged to protect him to the extent of its ability, for example through a Protecting Power. There is a general rule—and the outbreak of war or of hostilities does not detract from it—that a citizen is entitled to enter and leave his country at will unless the law provides otherwise: see *Chae Chan Ping v. United States* (1889), 9 S.Ct. R. 623, 629. By statute, any such restrictions derived from the prohibition on crossing the frontier except via defined frontier stations and from the obligation to acquire a travel document. In Israel the authorities have power, under section 122 of the Defence (Emergency) Regulations, 1945, also to order a person to remain outside the country, but we have not been informed that any such order has been made against the applicant's son. Exit from the State is also restricted by Defence Regulations of 1948. However, as has been said, apart from these two cases, the law recognizes the right of a person to return to Israel and it does not seem to me to be reasonable that the Court should deprive a person of his procedural capacity to enforce his rights.

"However, this Court, as a High Court of Justice, may withhold relief at its discretion, and in exercising our discretion we ought to give due regard to the reasons of national security upon which the respondent relied."

[After referring to the evidence concerning the care with which the application had been examined, Judge Zussman concluded:] "But I also cannot disregard the fact that after the establishment of the State and before peaceful relations had been established with Lebanon, the son remained for a very long time in an enemy country, although he did so for the purpose of completing his studies, and once crossed the frontier without permission. For these reasons I also think that we ought not to make the order *nisi* absolute."

[Report: *Piskei Din*, 6 (1952), p. 683.]

Enemy Character—Trading with the Enemy—Whether Involuntary Residence in Enemy Territory Constitutes Enemy Status.

See Case No. 122 (*Vamvakas v. Custodian of Enemy Property and Another*).

ii.—Of Corporations

Case No. 126 **War—Enemy Character—Of Corporations—Enemy Control of Corporation in Neutral Country—The Law of the United States of America.**

UEBERSEE FINANZ-KORPORATION, A.G. v. McGRATH.

United States, District Court, District of Columbia.

February 21, 1949.

Court of Appeals, District of Columbia Circuit. June 22, 1951.

Supreme Court, April 7, 1952.

THE FACTS.—Petitioner, a Swiss corporation, originally brought an action to reclaim shares of stock in American corporations which the Alien Property Custodian, acting under the Trading with the Enemy Act, 50 U.S.C. App. § 1 *et seq.*, had vested in himself. The Company contended that the property was free of all enemy taint. The District Court granted the Custodian's motion to dismiss; the Court of Appeals reversed, and the Supreme Court affirmed, the Court of Appeals, holding the complaint to be sufficient as against a motion to dismiss, and the case was sent back for trial. (See the report of this decision in *Annual Digest*, 1947, Case No. 91, *sub nom. Clark v. Uebersee Finanz-Korporation.*) At the trial the following facts were developed (as stated by the Supreme Court):

" In 1931, Wilhelm von Opel, a citizen and resident national of Germany, owned certain shares of stock in the Adam Opel Works, a German corporation largely owned by General Motors Corporation. Wilhelm had an agreement with General Motors to sell his shares at a price. In 1931, he became alarmed at business conditions in Germany and desired to get his stock out of the country in order to save his investment for himself and his family from the economic and governmental influences there prevailing. In that year, he and his wife entered into what was known under German law as a 'usufruct agreement' with their only son, Fritz, who had not lived in Germany since 1929 and for that reason was not subject to the German restrictions upon the handling of this property. By this agreement, Wilhelm's title to the shares in the Adam Opel Works was transferred to Fritz. The instrument provided as follows: 'The usufruct in the shares is not assigned to Fritz von Opel. It remains with Wilhelm von Opel and his wife . . . until the death of the survivor of them. However, twenty per cent. of all dividends and interest received will accrue to Fritz von Opel.'

" The instrument provided that if Fritz died before his parents and without issue, the transfer was to be void and was to revert to his parents, the transferors. If the parents died

before Fritz, he was to have the property as an advancement, to be deducted from his share in his parents' estate. The usufruct income not drawn by the parents was also to be accounted for by Fritz as an advancement.

"After much expert testimony, the District Court found the law of Germany pertaining to such usufruct agreement to be as follows [82 F. Supp. 605]:

'A right of usufruct, once established, is under German law an *in rem* right in property. A person having a usufruct in property has a right:

'(a) to the enjoyment of the property or, in the case of money or securities, to the income from the securities;

'(b) to co-possession of the property together with the person holding legal title to the property;

'(c) to a voice in the management of the property insofar as the maintenance and preservation of the usufructuary's rights under sub-section (a) above are concerned;

'(d) to prevent the sale or disposition of the property as a result of his right to co-possession; . . .'

"Under this agreement, Wilhelm and his wife had a usufruct in the Adam Opel stock transferred to Fritz. The latter, on October 17, 1931, sold the usufruct property to General Motors, in accordance with the contract which Wilhelm had with that Company. In order to protect the several interests involved, the proceeds of the sale were transferred to petitioner, a Swiss corporation acquired by Fritz for this purpose. Eventually these funds were used to purchase stocks, later transferred to petitioner, in corporations organized under the various states of the United States, from which derived the stocks vested by the Alien Property Custodian. Fritz owned ninety-seven per cent. of the stock of petitioner. Under the German law, as found by the District Court, a usufructuary may follow the ascertainable proceeds of the original property subject to the usufruct. Therefore, the stocks purchased by petitioner with the proceeds of the sale of the usufruct property were subject to and were treated as subject to the usufruct agreement.

"On June 7, 1935, Fritz placed all but three shares of the capital stock of petitioner in a safety deposit box in Zurich, Switzerland, and gave the key thereto to Hans Frankenberg, who received it as agent of Wilhelm von Opel. Frankenberg had become the managing director of petitioner at Wilhelm's request in 1932, and exercised control over petitioner's investments until the vesting of the property herein involved. By the delivery to Wilhelm's agent of the key to the box containing petitioner's stock, there was thus transferred to Wilhelm possession of the *res* subject to the usufruct; and the usufruct agreement was thereby consummated. Fritz also engaged in

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activities on behalf of petitioner concerning its investments, but under the guidance of Wilhelm or his agent, Frankenberg.

"Neither Wilhelm nor his wife ever drew any income from the usufruct. An oil lease owned by one of the American corporations whose stock was purchased with proceeds from the sale of the Adam Opel shares to General Motors, was sold, and the proceeds of that sale used to pay a fine of Wilhelm in Germany. Expenses of a trip by Wilhelm to South America and one to Hungary were paid by petitioner and charged against the income account of Fritz.

"Petitioner owned all the stock of a subsidiary Hungarian corporation engaged in the mining of bauxite in Hungary, and in 1939 and 1940 guaranteed a loan by a Swiss bank to this corporation for its operations. The loan was repaid in November 1942. The United States was at war with Hungary from December 13, 1941. During October, November, and December 1941, the Hungarian corporation shipped bauxite to Germany and had a contract to do so until the end of 1942.

"In 1942, the Alien Property Custodian vested the stocks held by petitioner in several American corporations and all the right, title, and interest of petitioner in and to a certain contract with another American corporation. All of the stocks had been acquired from the proceeds of the original usufruct property.

"From October 5, 1931, the date of the usufruct agreement, the usufruct property was controlled, used, and in all ways handled and directed by Wilhelm and his managing agents. The interest of Fritz in petitioner was wholly subordinated to that of Wilhelm. Fritz had the bare legal title and the right to twenty per cent. of the income from the property. Wilhelm is now dead. His wife, a daughter, and the son, Fritz, still survive."

Held (by the District Court): that the action must be dismissed. The Court said: "From what has been stated, it would be difficult in my opinion to find a stronger case of enemy taint in vested property short of full ownership by an enemy than exists in this case. The neutral aspect of ownership in the property is insignificant and it seems to me the plain intent of the Trading with the Enemy Act would be defeated by ordering a return of the vested securities" On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. The Court said:

"The essence of the legislation dealing with enemy ownership or control of property is the prevention of economic benefit to the enemy. The epitome of such economic benefit would be the flow into enemy hands of earnings from American efforts. No

phase of interest in property in this country fits more precisely into the intent and purpose of this legislation than does the ownership of the right to the dividends on the stock of domestic corporations. The language of the statute is sufficient to encompass that interest; a usufruct is the sort of 'interest' of which the statute speaks. In the case at bar that right was owned by German nationals. The usufruct, a right *in rem*, which included a right to the dividends, was owned, apart from the title to the shares themselves, by German nationals. This case does not involve a diluted 'taint'; it involves the ownership by enemy nationals of the economic benefits of American business. This seems to us to be a more obvious objective of the vesting provisions of the statute than is the bare ownership of a sterile legal title. As between the right to the naked tree and the right to the periodical fruit, the benefit to the enemy would be more in the latter than in the former."

On *certiorari*,

Held (by the Supreme Court): that the judgment of the Courts below must be affirmed. The Court said:

" . . . It is clear that petitioner for all practical purposes was, to the extent of ninety-seven per cent., largely owned, managed, used, and controlled by Wilhelm von Opel, a national of Germany. The findings demonstrate that petitioner was a corporate holding company acquired for the purpose of enabling Wilhelm to control and use his property as he saw fit. His interest was paramount and controlling. The interest of Fritz was wholly and in reality subordinated to Wilhelm's, except as to the right of Fritz to receive twenty per cent. of the income from the usufruct property. Petitioner was neutral in name only. Its enemy taint was all but complete because of the predominant influence and control of Wilhelm. Wilhelm had and used the substance, while Fritz had the bare legal title; and such right as this gave Fritz, he exercised or failed to exercise in complete subordination to the will of his father.

" Before 1941 the property here involved could not have been vested, because this petitioner was a corporation of a neutral country, Switzerland, unless such corporation was shown to be doing business in an enemy country or in the country of an ally or an enemy. *Behn, Meyer & Co. v. Miller*, 266 U.S. 457, 45 S.Ct. 165, 69 L.Ed. 374; *Clark v. Uebersee Finanz-Korp., A. G.*, *supra* [*Annual Digest*, 1947, Case No. 91]. But on December 18, 1941, Congress amended the Trading with the Enemy Act by the passage of the First War Powers Act, 1941, 55 Stat. 839, and gave respondent power to vest any property or interest of any foreign country or national thereof in said property. However, under § 9 (a) of the Trading with

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the Enemy Act, one not an enemy, as defined in § 2 of said Act, can recover any interest, right, or title which he has in the property so vested. As construed by this Court in *Clark v. Uebersee Finanz-Korp., A. G., supra*, § 2 included in the word 'enemy' all corporations affected with an 'enemy taint'. Since we find petitioner to be so affected because of the direct and indirect control and domination by an enemy national, Wilhelm von Opel, petitioner cannot recover under § 9 (a).

"It is suggested that there must be proof of the actual use of the property for economic warfare against the United States before it can be vested. The crucial fact is not the actual use by an enemy-tainted corporation of its power in economic warfare against the United States. It is the existence of that power that is controlling and against which the Government of the United States may move. The Government does not have to wait for the enemy to do its worst before it acts. *Cf. Miller v. United States*, 11 Wall. 268, at p. 306, 20 L.Ed. 135."

[Reports: 82 F.Supp. 602; 88 App. D.C. 182, 191 F. 2d 327; 196 F. 2d 557; 343 U.S. 205, 72 Sup. Ct. 618, 96 L.Ed. 888.]

NOTE.—After the second decision of the Supreme Court in the instant case further litigation has continued, to determine what interest, if any, in the seized property should be given up to Fritz von Opel: see 116 F. Supp. 145; 121 F.Supp. 420.

The second opinion of the Supreme Court is noted in *American Bar Association Journal*, 38 (1952), p. 674.

VII.—The Binding Force of the Laws of War

Laws of War—Binding Force of—Geneva Convention of 1929 relative to Treatment of Prisoners of War—Declaratory Effect of.

See Case No. 127 (*Execution of Prisoner of War (Germany) Case*).

IX.—Prisoners of War

Case
No. 127
Prisoners of War—Treatment of—Execution of Prisoner of War Without Trial—Plea of Necessity—Geneva Convention of 1929—Declaratory Nature of.

EXECUTION OF PRISONER OF WAR (GERMANY) CASE.

German Federal Republic, Federal Supreme Court.

May 6, 1952.

THE FACTS.—During the Second World War the appellant was a German civilian in charge of Soviet prisoners of war

who had been put to work in a German town. After a raid on this town, one of the prisoners was discovered in the act of looting from a damaged building, an offence punishable by death according to the German law then in force. The appellant, on being informed of the offence, shot and killed the prisoner. He was convicted of the offence of "intentional killing" as defined in the German Penal Code and now appealed to the Supreme Court, his contention being that this was a case of necessity which justified the killing, and that he was entitled to be acquitted.

Held: that the execution of the prisoner without trial was unlawful, and that the conviction must stand. The Court said:

"The Assize Court has rightly found that the offence satisfied the requirements of an intentional and unlawful killing. . . . The Geneva Convention of July 27, 1929, which contains detailed provisions on the punishment of prisoners of war, is not applicable to the present case because the victim was a Russian prisoner of war and the Soviet Union had not acceded to the Convention. Similarly, we can leave undecided the question whether the provisions of the Hague Regulations governing the treatment of prisoners of war, and in particular the dictates concerning the humane treatment of prisoners contained therein, are applicable to the present case, because it is a principle of law recognized by all civilized nations—which allows of no exception—that, independently of any rules expressly recognized in international agreements and municipal laws, a man may only be deprived of his life, even if he has committed a crime deserving of death, where there is a judgment inflicting the death penalty, such judgment being the result of prior legal proceedings in which he has been heard and in which his guilt has been proved. The Assize Court was therefore right in holding that even if, at the time of the offence, there were in existence in Germany ordinances and instructions disregarding this principle in relation to certain groups of human beings, such ordinances and instructions must be held to be devoid of binding force.

"The appellant is also wrong in contending that at the time when the offence was committed there was in existence a special state of emergency which justified or, at the very least, excused the act committed by him. It is true that international law recognizes the principle that the dictates concerning the humane treatment of prisoners of war may be ousted by a plea of military necessity, but even if we were to assume that a prisoner of war may be killed in certain circumstances—and such circumstances must, in any event, be interpreted restrictively, having regard to the basic principle that prisoners of

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war must be treated humanely—without a judgment preceding execution and by virtue of military necessity, the findings of fact by the Assize Court can leave no doubt that these prerequisites were totally absent, however widely they may be interpreted. It is immaterial whether the action of the Russian prisoner of war must be held to constitute a minor contravention or, having regard to the damage caused by an air attack and the resulting need to counter any laxity in the preservation of law and order with the greatest possible severity, to constitute a serious violation of the law, because the attack had come to an end. Moreover, there was no need to apprehend a repetition. The act committed by the prisoner was not even such as to set a bad example to others. It had been noticed only by a foreman who subsequently caught him. The Assize Court was right in saying that there was no imminent danger of any kind. Having regard to these circumstances, we must hold that the appellant had no right to make use of firearms, let alone to kill the prisoner intentionally, on the ground that this was a case of necessity. Accordingly, the Assize Court was right in affirming the unlawful nature of the offence."

[Report: NJW, 5 (1952), p. 795.]

XII.—Termination of War

War—Commencement and Termination of—Effect of General Armistice Agreement.

See Case No. 115 (*Diab v. Attorney-General*).

XV.—Miscellaneous

Case
No. 128

War on Land—Treatment of Wounded—Article 28 of the Geneva Wounded and Sick Convention of 1929—Abuse of Red Cross Emblem—Abuse of Swiss National Flag—Evidence as to "Wounding Swiss National Sentiment"—Letter from Swiss Minister as Evidence.

PUBLIC PROSECUTOR *v.* DIRECTOR OF THE ZWITSERSE
WASIN-RICHTING RIJSWIJK.

Holland, Supreme Court. June 5, 1951.

Court of Appeal of the Hague. October 12, 1951.

Supreme Court. May 13, 1952.

THE FACTS.—The Director of a Dutch laundry business which used the arms of the Swiss Confederation on its letter headings, wrapping material and delivery vans, was on April 20, 1950, convicted for so doing by the Cantonal Court of The Hague, under Article 433 (2) (a) of the Netherlands Criminal

Code. This Article had been inserted in the Code by a special Law of November 1, 1948 (*Staatsblad*, No. I 480), in order to give effect to Article 28 of the Geneva Convention of July 27, 1929, for the Relief of the Wounded and Sick in Armies in the Field.¹ His conviction was quashed by the District Court of The Hague on October 27, 1950, on the ground that the question whether the arms of the Swiss Confederation had been used in circumstances capable of wounding Swiss national sentiment must be answered in conformity with Dutch ideas on the matter.

The Public Prosecutor lodged an appeal in cassation (*i.e.*, on a point of law) with the Supreme Court.

Held (by the Supreme Court, on June 5, 1951): that the judgment of the District Court must be reversed and the conviction restored. That Court had based its judgment on wrong premises. The possibility of giving offence to a particular national sentiment may exist apart from views generally held in the Netherlands. Such views, therefore, cannot be relied upon for determining the degree of sensitivity of another people's feelings, which has to be established independently by the *judex facti*. [Report: *N.J.*, 1951 No. 521.]

The case was referred (under Article 106 of the Judicature Act) to the Court of Appeal at The Hague, to review the original conviction by the Cantonal Court.

Held (by the Court of Appeal): that the conviction must stand. The Court read an official letter from the Swiss Minister at The Hague, which stated that "the use of the arms of the Swiss Confederation on paper and on delivery vans was likely to wound Swiss national sentiment. Moreover, the mere fact that the Swiss emblem was used for a purely commercial purpose constituted an infringement of the respect due to national emblems, the more so because the company concerned had no relation to the Swiss Confederation."

¹ Article 28 provided in part as follows:

"The Governments of the High Contracting Parties whose legislation is not at present adequate for the purpose, shall adopt or propose to their legislatures the measures necessary to prevent at all times:

"(a) The use of the emblem or designation 'Red Cross' or 'Geneva Cross' by private individuals or associations, firms or companies, other than those entitled thereto under the present Convention, as well as the use of any sign or designation constituting an imitation, for commercial or any other purposes;

"(b) By reason of the compliment paid to Switzerland by the adoption of the reversed federal colours, the use by private individuals or associations, firms or companies of the arms of the Swiss Confederation, or marks constituting an imitation, whether as trade-marks or as parts of such marks, for a purpose contrary to commercial honesty, or in circumstances capable of wounding Swiss national sentiment."

(The corresponding Article of the 1949 Convention is Article 53.)

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The Director of the laundry business, in his turn, appealed in cassation to the Supreme Court, on the ground, *inter alia*, that the Court of Appeal had wrongly admitted the official statement of the Swiss Minister as "evidence" of general Swiss national sentiment and had wrongly accepted the Minister's assertion that every kind of use of the Swiss emblem for a commercial purpose was in itself unlawful, since the Law and the Convention required something more¹ to make the use of the emblem punishable.

Held (by the Supreme Court, on May 13, 1952, on procedural grounds): that the appeal must fail.

[Report: *N.J.*, 1952, No. 684, with a Note by Professor Pompe.]

NOTE.—For the earlier history of this case see *Annual Digest*, 1933-1934, Case No. 220 (decided before the amendment of the Netherlands Criminal Code made abuse of the arms of the Swiss Confederation a crime).

B—WARFARE ON LAND

III.—Occupation of Enemy Territory

i.—Nature and Effects of the Occupation

Case **Belligerent Occupation—Nature and Effects of—Officials of**
No. 129 **Occupied State—Authority to Bind State—Invalidity of**
 Occupation Ordinances—The Law of the Netherlands.

CENTRALE ONDERLINGE INSURANCE COMPANY *v.* STATE OF
THE NETHERLANDS.

Holland, District Court of the Hague.
April 2, 1952.

THE FACTS.—From 1942 to 1945, all employers in the Netherlands of workers for the German Todt Organization were compelled by the latter to enter into sickness insurance contracts with the plaintiff Company, paying a premium of $2\frac{1}{2}$ per cent. of their gross wages. These insurances caused the Company considerable losses. They therefore applied in 1943 to the Secretary-General of the Netherlands Department of Social Affairs with a view to getting an assurance that they would not be left in the position of having to carry the burden

¹ That is, "for a purpose contrary to commercial honesty, or in circumstances capable of wounding Swiss national sentiment."

alone, but that their losses would be spread over all the social insurance bodies and companies concerned. The Secretary-General gave a promise to this effect, which was indeed honoured by the enactment of three Occupation Ordinances dated respectively November 1, 1943, and February 14 and April 14, 1944. After the war, these Ordinances were at first provisionally suspended by the Decree on Occupation Measures No. E 93, and eventually declared never to have been in force (Law of February 28, 1947: *Staatsblad* No. H 70). Thereupon, the plaintiff brought an action against the State to compel it to honour the obligation undertaken by the Secretary-General in 1943.

Held: that the claim must be dismissed. The pledge given by the Secretary-General in 1943 was in the nature of a promise to enact certain legislative measures. It was not an engagement entered into on behalf of the State with a view to, and with the effect of, creating a legal contractual obligation to enact the proposed decrees. Still less could it create an obligation for the State to maintain the decrees, once enacted, in force after the return of the lawful Government.

[Report: *N.J.*, 1953, No. 684.]

Belligerent Occupation—Nature and Effects of—Maintenance of Local Law—Article 43 of Hague Regulations of 1907—Japanese Occupation of Netherlands Indies.

See Case No. 29 (*Hausmann v. Koninklijke Rotterdamse Lloyd*).

Belligerent Occupation—Effect on Nationality—Australian Occupation of New Guinea.

See Case No. 58 (*Wong Man On v. The Commonwealth*).

Military Occupation—Nature of—Sovereignty over Occupied Territory—Status of Occupied Germany after the Second World War.

See Case No. 59 (*Acheson, Secretary of State v. Wohlmuth*).

ii.—Legislative, Judicial and Administrative Functions of the Occupant

Case No. 130 **Occupation of Enemy Territory—Judicial Functions of the Occupant—Jurisdiction of Military Tribunals of Occupant over Persons Accompanying its Armed Forces—Wife of Officer Member of Occupying Forces—Conviction for Violation of Laws of Occupied Territory.**

MADSEN *v.* KINSELLA.

United States, District Court, Southern District, West Virginia.
September 8, 1950.

Court of Appeals, Fourth Circuit. April 2, 1951.

Supreme Court. April 28, 1952.

THE FACTS (from the decision of the District Court).—“ On October 20, 1949, petitioner, being the wife of a lieutenant serving in the American Army in the American Zone of Occupied Germany and residing with her husband, pursuant to military permission, in Buchschleg, Kreis Frankfort, shot and killed her husband. She was tried before a tribunal originally known as a ‘ United States Military Government Court for Germany ’, but whose name was later changed to the ‘ United States Court of the Allied High Commission for Germany, Fourth Judicial District ’, which Military Government Court was created by an ordinance promulgated by the Department of the Army of the United States through the office of the Adjutant General. The crime with which she was charged was violation of section 211 of the German Criminal Code, which defines the crime of murder and prescribes the penalty therefor. She was found guilty and, pursuant to sections 51 and 44 of the same Code, ameliorating the punishment in certain cases, was sentenced to a term of fifteen years’ confinement.

“ On appeal to the Court of Appeals of the United States Courts of the Allied High Commission for Germany the conviction and sentence were affirmed.

“ Petitioner was confined in the Federal Reformatory for Women at Alderson, West Virginia, where she has since been in custody of the warden. She now seeks release by means of the writ of habeas corpus.”

Petitioner’s substantial contentions were as follows: “ First, that the Court by which she was tried and sentenced was lacking in jurisdiction to try anyone (especially any American citizen) because it was not established nor were its judges appointed by any authority known to the American Constitution or to the common law of war.

"Secondly, that if it should be held that the Court had jurisdiction to try American citizens, yet it had no such jurisdiction to try them for violations of German law, nor to deny to them any of the rights guaranteed by the Constitution of the United States to its citizens when tried in its courts.

"Thirdly, that petitioner is one of a class of persons who, by the provisions of the Articles of War, 10 U.S.C. section 1471 *et seq.*, is subject to the exclusive jurisdiction of courts-martial."

Held (by the District Court): that petitioner has alleged no fact which warrants her release. On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be affirmed. On *certiorari*,

Held (by the Supreme Court, Black J. dissenting): that the judgments of the Courts below must be affirmed.

The Court said:

"Both United States courts-martial, and United States Military Commissions or tribunals in the nature of such commissions, had jurisdiction in Germany in 1949-1950 to try persons in the status of petitioner on the charge against her.—Petitioner does not here attack the merits of her conviction nor does she claim that any non-military court of the United States or Germany had jurisdiction to try her. It is agreed by the parties to this proceeding that a regularly convened United States general court-martial would have had jurisdiction to try her. The United States, however, contends, and petitioner denies, that the United States Court of the Allied High Commission for Germany, which tried her, also had jurisdiction to do so. In other words, the United States contends that its courts-martial's jurisdiction was concurrent with that of its occupation courts, whereas petitioner contends that it was exclusive of that of its occupation courts.

The key to the issue is to be found in the history of United States military commissions and of United States occupation courts in the nature of such commissions. Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common-law war courts. They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth. See *In re Yamashita*, 327 U.S. 1, 18-23, 66 S.Ct. 340, 349-351, 90 L. Ed. 499 [*Annual Digest*, 1945, Case No. 11].

"In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of

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the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States. His authority to do this sometimes survives cessation of hostilities. The President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms. The policy of Congress to refrain from legislating in this uncharted area does not imply its lack of power to legislate. That evident restraint contrasts with its traditional readiness to 'make Rules for the Government and Regulation of the land and naval forces'; [U.S. Constitution, Article I, section 8]. Under that clause Congress has enacted and repeatedly revised the Articles of War which have prescribed, with particularity, the jurisdiction and procedure of United States courts-martial.

"Originally Congress gave to courts-martial jurisdiction over only members of the Armed Forces and civilians rendering functional service to the Armed Forces in camp or in the field. Similarly the Articles of War at first dealt with nonmilitary crimes only by surrendering the accused to the civil authorities. Article 33, American Articles of War of 1806, *Winthrop's Military Law and Precedents* (22nd ed. 1920 reprint) 979. However, in 1863, this latter jurisdiction was enlarged to include many crimes 'committed by persons who are in the military service of the United States. . . .' Still it did not cover crimes committed by civilians who, like petitioner, were merely accompanying a member of the Armed Forces.

"Finally, in 1916, when Congress did revise the Articles of War so as to extend the jurisdiction of courts-martial to include civilian offenders in the status of petitioner, it expressly preserved to 'military commissions, provost courts, or other military tribunals' all of their existing concurrent jurisdiction by adding a new Article which read in part as follows:

'Art. 15. Not exclusive.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals'. 39 Stat. 651, 652, 653.

"Article 15 thus forestalled precisely the contention now being made by petitioner. That contention is that certain provisions, added in 1916 by Articles 2 and 12 extending the jurisdiction of courts-martial over civilian offenders and over certain nonmilitary offenses, automatically deprived military commissions and other military tribunals of whatever existing jurisdiction they then had over such offenders and offenses.

Articles 2 and 12, together, extended the jurisdiction of Courts-martial so as to include 'all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States. . . .' The 1916 Act also increased the nonmilitary offenses for which civilian offenders could be tried by courts-martial. Article 15, however, completely disposes of that contention. It states unequivocally that Congress has not deprived such commissions or tribunals of the existing jurisdiction which they had over such offenders and offenses as of August 29, 1916. 39 Stat. 653, 670. See *In re Yamashita* [supra] and *Ex parte Quirin*, 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3 [Annual Digest, 1941-1942, Case No. 168].

"The concurrent jurisdiction thus preserved is that which 'by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.' (Emphasis supplied.) 39 Stat. 653, 41 Stat. 790, 10 U.S.C. section 1486, 10 U.S.C.A. section 1486. The 'law of war' in that connection includes at least that part of the law of nations which defines the powers and duties of belligerent powers occupying enemy territory pending the establishment of civil government. The jurisdiction exercised by our military commissions in the examples previously mentioned extended to nonmilitary crimes, such as murder and other crimes of violence, which the United States as the occupying power felt it necessary to suppress. In the case of *In re Yamashita*, 327 U.S. 1, 20, 66 S.Ct. 340, 350, following a quotation from Article 15, this Court said, 'By this recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war.' The enlarged jurisdiction of the courts-martial therefore did not exclude the concurrent jurisdiction of military commissions and of tribunals in the nature of such commissions.

"*The United States Courts of the Allied High Commission for Germany were, at the time of the trial of petitioner's case, tribunals in the nature of military commissions conforming to the Constitution and laws of the United States. Petitioner and the offense charged against her came within the jurisdiction assigned to the Court which tried her.*—Under United States Military Government Ordinance No. 31, August 18, 1948, Article 7, 14 Fed. Reg. 126, the United States gave its Military Government District Courts 'criminal jurisdiction over all persons in the United States Area of Control except persons, other than civilians, who are subject to military, naval or air force law and are serving with any forces of the United Nations.' It thus excepted from the jurisdiction of those occupation courts

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military men and women who were subject to military law but expressly gave those courts jurisdiction over civilian men and women who were subject to military law. Article of War 2 (d) further defined 'any person subject to military law' as including 'all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States. . . .' This included petitioner.

"Article 7 of the United States Military Government Ordinance No. 31 further provided, however, that 'No person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander-in-Chief, European Command.' 14 Fed. Reg. 126. That authorization appears in the official correspondence relating to the case of *Wilma B. Ybarbo*¹. The correspondence includes a written endorsement from the proper authority, dated December 11, 1948, covering not only the *Ybarbo* case but also the case 'of any dependent of a member of the United States Armed Forces. . . .'

"The applicability of the German Criminal Code to petitioner's offense springs from its express adoption by the United States Military Government. The United States Commanding General, in his Proclamation No. 2, September 19, 1945, stated that, except as abrogated, suspended or modified by the Military Government or by the Control Council for Germany, 'the German law in force at the time of the occupation shall be applicable in each area of the United States Zone of Occupation. . . .' 12 Fed. Reg. 6997. Section 211 of the German Criminal Code accordingly was applicable to petitioner on October 20, 1949. The United States also expressly required that its civilians be tried by its occupation courts rather than by the German courts. United States Military Government Law No. 2, German Courts, Article VI (i) (c) and (d), 12 Fed. Reg. 2192, United States Military Government Ordinance No. 2, Article II (2).

"The jurisdiction of the United States Courts of the Allied High Commission for Germany to try petitioner being established, the judgment of the Court of Appeals affirming the discharge of the writ of habeas corpus for petitioner's release from custody is affirmed."

Black J., dissenting, said:

"Whatever may be the scope of the President's power as Commander-in-Chief of the fighting armed forces, I think that if American citizens in present-day Germany are to be tried by the American Government, they should be tried under laws passed by Congress under its constitutional authority."

¹ See *Annual Digest*, 1949, Case No. 160.

[Reports: 93 F. Supp. 319; 188 F. 2d 272; 343 U.S. 341, 72 Sup. Ct. 699, 96 L.Ed. 988.]

NOTE.—The decision of the Supreme Court is noted in *American Bar Association Journal*, 38 (1952), p. 671; *American Journal of International Law*, 47 (1953), p. 300; *Annual Survey of American Law*, 1952, p. 132; *Southern California Law Review*, 26 (1953), p. 217.

Belligerent Occupation—Administrative Acts of the Occupant —Whether Binding on Lawful Authorities—German “Annexation” of Alsace-Lorraine—Acts of German Municipal Administrator. Case
No. 131

SOC. AU GRAND MARCHÉ *v.* CITY OF METZ.

France, Cour de Cassation.

December 2, 1952.

THE FACTS.—The appellant Company before the Second World War owned a large block of buildings in the centre of Metz. During the war the Departments of Bas-Rhin, Haut-Rhin and Moselle were “annexed” by Germany, and the French municipal administration in towns such as Metz was replaced by a German authority. In June 1942 the property of the appellant Company was sequestered by the head of the civil administration of Lorraine, as belonging to an enemy of the German Reich. The German municipal administration of Metz bought the property after it had been so sequestered, and demolished the buildings with a view to the construction of municipal offices. After the war the Company brought an action against the municipality of Metz, which was again French, for restitution of the property, and for damages in respect of its demolition and the loss of its use, in reliance on the Ordinance of April 21, 1945, concerning the restitution of property unlawfully seized by the enemy. The Court of Appeal held that the sale of the property was null and void, and ordered its restitution to the Company. On the other hand, it held that the Company was not entitled to compensation, on the ground that the French municipality of Metz could not be made responsible for the acts of an authority which had taken its place in violation of both national and international law. This was an appeal against that decision.

Held: that the judgment of the Court below must be quashed. The Court said:

“A public body corporate has a continuous existence independent of its organs. Even acts accomplished by a *de facto* authority, which replaced the *de jure* organs, in irregular circumstances, must be regarded as administrative acts which involve the responsibility of the collectivity for which the *de facto* authority acted. The City of Metz, although run

Case No. 131 during the occupation by an administration set up by the enemy, continued to exist and, in law, remained French. It is bound by the obligations assumed by that administration.”

Contd.

[Report: *Dalloz Hebdomadaire*, 1953, *Jurisprudence*, pp. 3 and 9-351.]

NOTE.—See, to the same effect, *Ville de Mulhouse v. Pitre*, decided by the same Court on the same day (*ibid.*, p. 351).

Case No. 132 **Belligerent Occupation—Judicial Powers of Occupant—Tribunals of Occupant—Whether Foreign or Municipal Tribunals—Conviction for Criminal Offence by Court of Occupied Territory—Subsequent Trial for Similar Offence by Tribunal of Occupant—Whether Accused Entitled to Privileges regarding Punishment Contained in Law of Occupied Country—The Law of Germany.**

UNITED STATES HIGH COMMISSIONER FOR GERMANY *v.* BRULLE.

United States Zone of Germany, United States Military Government Court of Appeals.
February 18, 1952.

THE FACTS.—Sections 74-79 of the German Penal Code provide in effect that where a person who is still serving a sentence for a criminal offence is convicted of a further offence or offences of a similar nature committed on a different occasion, such person, on being convicted of the further offence or offences, shall be liable to a sentence higher than the severest sentence which could have been imposed for each such single offence, but lower than “the sum total of the individual punishments incurred”. The appellant was convicted by an American tribunal exercising jurisdiction in occupied Germany of two offences of larceny within the meaning of the German Penal Code. At the time of such conviction he was serving a sentence imposed by a German court in respect of other acts of larceny committed after the acts of larceny forming the subject-matter of the present proceedings. The American tribunal imposed a sentence which did not take account of the provisions of the German Penal Code here referred to, and the appellant contended on appeal against sentence that he was entitled to the benefit of these provisions.

Held: that the appellant’s contention should be upheld and the case remitted for re-sentencing in accordance with the above provisions of the German Penal Code. The Court said: “Though German commentators hold to the view that convictions in occupation courts are not such as to require consideration by a German court, when applying section 79,

we adhere to our previously announced policy of providing defendants coming before our Courts with the full protection of the German Criminal Code when charged with offences under German law. We think that the provisions of section 79 should apply in the case of previous sentences under German law imposed either by occupation courts or by German courts.

"The case is remanded for re-sentencing in accordance with the provisions of section 79 of the German Criminal Code."

[Report: (1951/2) XIII C.A.R. (U.S.) 476.]

Belligerent Occupation—Legislative and Judicial Functions of Occupant—Power to Set up Court of Ordinary Criminal Jurisdiction—Mixed Courts—British Occupation of Ethiopia—Court Consisting of British President and Italian Members—Article 43 of the Hague Regulations. Case No. 133

Re CONDARELLI.

Italy, Court of Cassation.

July 5, 1952.

THE FACTS.—Upon the occupation of Ethiopia by British forces during the Second World War, the Italian Court of Appeals of Addis Ababa was suppressed by the Occupying Power and replaced by an appellate tribunal sitting at Asmara. This new Tribunal was composed of a British President and two Italian citizens and was invested with jurisdiction in appeals from Italian colonial courts of first instance, which were maintained in existence. Its jurisdiction was not confined to crimes related to the state of war, but extended to all ordinary crimes. On appeal from a decision of the Tribunal sustaining a criminal conviction,

Held: that the decision was a nullity. The setting up of the Tribunal under the auspices of the Occupying Power was not justified by the principles of customary international law restated in Article 43 of the Hague Regulations respecting the Laws and Customs of War on Land. The Court said:

"Belligerent occupation originally involved no transfer of sovereignty. Towards the close of the seventeenth century a contrary theory developed. But it was later universally acknowledged that such exceptions as had been admitted during the wars of that century were irregular, and it has come to be firmly established that the occupation of territory in no way affects the sovereignty of the occupied State. Hence it follows that the legal order of the occupied State is neither suppressed nor destroyed, and that those of its organs which

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continue to function in its name are unaffected by the fact of occupation. Nevertheless, it is clear that the Occupying Power may exercise a certain authority in the occupied territory. Thus, in the first place, that Power may take all measures necessary for its own security and for that of its forces. It may likewise do anything which is necessary in order to maintain public order or to supply deficiencies in the pre-existing administrative machine which may have developed, provided always that such measures as are resorted to are called for by operations of war. For it is the requirements of belligerent operations which supply the general criterion employed by the rules of international law regulating belligerent occupation.

" These principles, which were developed as customary international law, were solemnly restated in Article 43 of the Regulations annexed to the Second Hague Convention of July 29, 1899 (ratified by both Italy and the United Kingdom), and the Fourth Hague Convention of October 18, 1907. In virtue of that Article, the text of which is the same in both Conventions, the Occupying Power must refrain, save in case of absolute necessity, from modifying the law of the occupied State. Such absolute impediment must arise out of operations of war, the hindering of which the occupant is entitled to prevent.

" It follows from these rules of international law that the Occupying Power cannot legitimately set up its own courts of general jurisdiction in the occupied territory, even if these are directed to apply the *lex loci*, nor modify the pre-existing system of judicature, unless in an exceptional case justified by valid considerations of military necessity. But that Power may lawfully establish judicial organs, and in particular criminal courts, in order to ensure the security of its own forces. Thus it has always been recognized that the Occupying Power may set up in the occupied territory courts-martial applying its own law for the trial of offences prejudicial to operations of war. But any assumption by the Occupant through its own courts of jurisdiction over crimes not even remotely prejudicial to the security of itself and its forces and having no relation to the state of war, involves a violation of the principles of international customary law restated in Article 43 of the Hague Regulations. Nor can the Occupant set up mixed courts made up of judges belonging both to its own hierarchy and to that of the occupied State, without a like violation of international law, the appointment of judges being one of the most jealously regarded prerogatives of a State and one of the more significant manifestations of its sovereignty.

" It is in the light of the principles of international law which have been outlined above that the question raised by the

instant appeal must be examined—the question, that is to say, of the legal significance of a decision of a tribunal of a mixed character, such as the decision of the Court of Appeals of Asmara of February 9, 1946. And in relation to this question it is to be recalled that, after the occupation of Ethiopia by British troops, the United Kingdom suppressed the Court of Appeals established at Addis Ababa by Royal Decree No. 2010 of August 21, 1936, and created this Court at Asmara, appointing as President thereof a senior British official and as members two Italian citizens, one a judge of appeals and the other an administrative official. To this Court there was assigned the trial of appeals from decisions of the sessions courts (Judges of the Colony) and the trial of ordinary crimes having no relation to the state of war. Trials in any way of interest to the British administration were assigned to the British Military Court, consisting of a single British Judge.

“In the light of this it is manifest that the decision in question cannot be regarded as having any legal effect and that it must be treated as a nullity. The setting up of the Court of Appeals at Asmara in the manner outlined was indubitably contrary to the principles of international customary law and to Article 43 of the Hague Regulations, and its endowment with appellate jurisdiction in ordinary crimes unrelated to the state of war cannot be justified on any ground of absolute impediment arising from military necessity within the terms of the latter Article. Its decision of February 9, 1946, being thus the decision of an irregularly constituted tribunal lacking any proper jurisdictional power, is therefore to be treated as a mere factual event and not as an act in the law. . . .”

[Report: *Rivista di Diritto internazionale*, 1953, p. 451.]

Belligerent Occupation—Legislative and Judicial Functions of Occupant—Administrative Acts of Puppet Régime Established under Protection of Occupant—Validity of—So-called Italian Socialist Republic. **Case No. 134**

FATTOR *v.* MINISTERO FINANZE.

Italy, Council of State.

July 13, 1952.

THE FACTS.—Italian Decree-Law No. 249 of October 5, 1944, provided in Article 1 (1) that “All acts done and all laws or decrees promulgated under the authority of the self-styled Government of the Italian Socialist Republic [the puppet régime established in German-occupied Italy after the fall of Mussolini] are hereby deprived of all legal effect.” Upon a question as to whether this measure annulled administrative

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acts done under the auspices of the German occupying authorities during the period between the beginning of the German occupation on September 8, 1943, and the date of the actual setting up of the Italian Socialist Republic,

Held: that the Decree-Law did so apply. A legitimate Government may annul acts of an illegitimate authority functioning under the aegis of an enemy occupying force, belligerent occupation being in international law an essentially temporary condition of things, not extinguishing the rights of sovereignty of the occupied State. The Court said:

"The appellant contends that the decision of the Court below is wrong in law and is, in particular, contrary to Articles 2 and 4 of Decree-Law No. 249 of October 5, 1944. In substance, the argument raises the question of the applicability of the provisions of that measure during the brief period between September 8, 1943, and the establishment of the self-styled Italian Socialist Republic. Having regard to the actual wording of the Decree-Law [the Court here set out Article 1 (1) thereof, reproduced above], the appellant maintains that it strikes only at the legislative, judicial or administrative acts of organs of the Government of the so-called Socialist Republic done after the proclamation and actual establishment of that entity, and that it cannot apply to anything done at any earlier time. It thus applies only in relation to acts which can be attributed to departments or agencies of that Government and which can be shown to have been done after the latter was in fact set up. The respondent Treasury contests this view on the basis of this Court's decisions No. 237 of November 12, 1948, and No. 219 of April 8, 1949, which it asks should be followed.

"The Court would observe as a preliminary that it is an undisputed principle of law that a legitimate Government is competent to annul administrative acts done under the authority of the commander of an enemy force in occupation of the whole or part of the territory of the State when the occupation has been brought to an end. For belligerent occupation is an essentially temporary state of affairs which does not extinguish the sovereignty over the occupied territory of the State to which that sovereignty belongs. The Hague Conventions of 1907 and the later Brussels Declarations of 1909 respecting the laws and customs of war, which Italy signed without reservation, all lay down that the Occupying Power must leave the existing law in force in so far as respects the general administration of the occupied territory. From this it follows that, once the occupation has ceased, the legitimate Government has power to provide for the review of administrative acts done by the Occupant or by agencies acting under his

control with a view to establishing which of them are in conformity with the laws of the State.

" Acts done in that part of the country which was in German occupation during the short interval between September 8, 1943, and the setting-up of the so-called Government of the Italian Socialist Republic are to be evaluated in the light of the principles deducible from the international conventions to which reference has been made and of the Decree-Law referred to, the latter being in part, though no doubt indirectly, inspired by the former.

" The Court holds that for the purposes of such a review the following elements should be taken into account:

" (1) the command of the German armed forces relied, so far as concerned matters of administration of the occupied territory, upon instrumentalities and organs destined to become part of the apparatus of the illegitimate Government then in process of formation and operating on the basis of a system of administration and administrative rules antagonistic to that established for the whole country by the legitimate Government upon the collapse of the Fascist system;

" (2) the expression 'acts done . . . under the authority of the self-styled Government of the Italian Socialist Republic', as used in the Decree-Law, logically includes all acts done on the same basis and for the same ends, whether directly by the Government specifically referred to or by agencies of that Government during the brief preliminary phase of its formation;

" (3) the legislature viewed the actual sequence of events during the period in question as an historical unity and its judgement in the matter, which must serve to justify the assimilation of acts of these two categories to a single category, cannot be called in question.

" Having regard to these elements, a logical interpretation of the Decree-Law emerges which is not in fact at variance with its literal interpretation. In the opinion of the Court there can be no doubt but that the provisions of the Decree-Law apply in relation to administrative acts done in the part of the State in the occupation of the German army during the period referred to."

[Report: *Giurisprudenza del Consiglio di Stato*, 1952, p. 987.]

Belligerent Occupation—Legislative Powers of Occupant—Article 43 of Hague Regulations—Legislative Powers Granted by Armistice Agreement—Occupation of Italy—Requisition under the Terms of the Armistice. **Case No. 135**

In *Genel and Bussi v. Steiner*, decided on July 31, 1952, the Italian Court of Cassation rejected the argument that the

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legislative powers of the Allied Powers in occupation of Trieste were limited by Article 43 of the Hague Regulations respecting the Laws and Customs of War on Land, observing that the Armistice with Italy of 1943 conceded to the occupying Powers full legislative authority. The Court said in part: "The first ground of appeal advanced by Genel raises a new question: that as to whether General Order No. 58 of the Allied Military Government is not inapplicable inasmuch as, at least since September 15, 1947, the Anglo-American forces occupying the Territory of Trieste are to be regarded as forces of mere temporary occupation. From this it would follow, the appellant argues, that only Italian law applies in the Territory, the Occupant not having power to modify it save for the maintenance of public order. But this argument is unfounded. The appellant alleges in substance a violation of Article 43 of the Regulations annexed to the Fourth Hague Convention of November 18, 1907. That Article confines the legislative competence of the occupying authorities to the maintenance of public order and safety exclusively, and provides that the law of the occupied State shall in general remain in force. As this Court has repeatedly held, however, the operation of that Article was excluded by the Armistice Agreement of September 1943, between Italy and the United Nations, Article 20 of which accords complete and unlimited legislative competence to the occupying authorities. Hence the Court of Trieste was right in basing its decision on the General Order referred to. . . ." [Report: *Foro Padano*, 1952, p. 1292.]

In *Donati v. Prefetto Pesaro*, decided on February 12, 1952, the Italian Court of Cassation, on appeal from an administrative tribunal, *held* that requisitions effected in occupied Italian territory by the Allied military authorities pursuant to the terms of the Armistice of September 1943, were equivalent in all respects to those levied by the Italian State itself. Hence the Allies enjoyed in this regard powers superior to those of a mere belligerent occupant. [Report: *Mass. Foro Italiano*, 1952, p. 82.]

Case **Belligerent Occupation—Legislative and Administrative**
No. 136 **Functions of Occupant—Appointment and Replacement of**
Public Officials—Attribution of Additional Functions to
Officials—Dictation of Terms of Contracts of Public Bodies
—War—Recognition by Law of Occupied State—Legislation
concerning Jurisdiction of Civil Courts—Legislation Regu-
lating Commerce.

In *Burger v. Ente Naz. Tre Venezia*, the Italian Court of Cassation *held*, on July 10, 1952, on appeal from the Court of Appeals of Trieste, that it was within the power of a belligerent

Occupant, in order either to lend its support to the local administration of the occupied territory where that administration has broken down or to eradicate elements hostile to itself, to replace or to nominate public officials. But such action might not be taken in order to subvert the local administration or to impose the Occupant's own power to the extent of destroying the autonomy enjoyed by entities of either public or private law under the régime of the occupied State. The Occupant might legitimately replace officials exercising supervisory functions over organs of the State or other public bodies, but, the power of requiring entities to act in one way rather than another not being permitted to supervisory organs by Italian law, that power was not to be conceded, either, to the Occupant in any context in which no question of the security of the occupying forces or of military necessity was involved. Thus, where the Occupying Power had by a directive dictated the terms of contracts entered into by a public body, that directive was invalid and the effects of its invalidity extended to a contract entered into in conformity with it. [Report: *Mass Foro Italiano*, 1952, p. 503.]

In *Quaglia v. Caiselli*, decided on May 7, 1952, the Italian Court of Cassation held, on appeal from the Court of Appeals of Trieste, that the Ordinances of the Allied Military Government maintaining the occupation régime in force in Trieste could not alter the rules respecting curial jurisdiction applicable there, and that an ordinance purporting so to do had no significance from the point of view of Italian law. [Report: *Mass. Foro Italiano*, 1952, p. 317.]

In *Raffineria Olii Minerali v. Soc. Selezione Semi Oleosi*, decided on January 17, 1952, the Italian Court of Cassation observed, on appeal from the Court of Appeals of Milan, that it was internationally recognized that an Occupying Power had power to make rules of law binding upon the inhabitants of occupied territory. Hence, an ordinance promulgated by the German authorities in occupied Italy for the purpose of regulating trade and restricting traffic in various goods, was to be regarded as valid. It was immaterial to its validity that thereunder administrative rather than judicial organs of the Occupying Power were empowered to impose the sanctions, particularly pecuniary penalties, prescribed. [Report: *Mass. Foro Italiano*, 1952, p. 34.]

Case **Belligerent Occupation—Legislative and Administrative**
No. 137 **Powers of Occupant—Power to Modify the Fiscal System—**
Waiver of Excise Duties—Invalidity of Particular Waiver in
Nature of Individual Privilege—Article 48 of the Hague
Regulations.

LIGABUE *v.* FINANZE.

Italy, Tribunal of Venice.

January 28, 1952.

THE FACTS.—The plaintiff was the concessionaire of a bonded warehouse from which brandy was requisitioned by the German military authorities for the use of the forces in occupation of Northern Italy during the Second World War. The requisition orders stipulated that no excise duty should be chargeable upon the spirit taken. In an action for a declaration that the duty was irrecoverable,

Held: that the action must fail. A belligerent Occupant has, in virtue of Article 48 of the Hague Regulations, which is part of Italian municipal law, power to legislate in fiscal matters. But this power must be exercised by the making of general provisions. Special exemption orders creative of individual privileges, such as were in question here, were unlawful. The Court said:

" . . . It is indisputable that, as Ligabue contends, the operations of the German forces in Italian territory after the Armistice [between Italy and the United Nations] of . . . September 1943 amounted to a regular belligerent occupation of the territory affected. The circumstance that the German army made common cause with the illegitimate Government of Salò [the puppet régime set up in the German-occupied part of the country after the Armistice] functioning in the same area did not alter the essentials of the then situation—a situation dominated by the fact that the German army, in order to maintain itself in occupation for purposes of carrying on the struggle with the Anglo-American forces and of extending the war to the legitimate Italian Government, promulgated ordinances and proclamations effective throughout the occupied area and imposed its will by force of arms upon individuals and property, as well as upon the said illegitimate Government.

" It is equally indisputable that the German military occupation, in so far as concerns its impact upon our internal order, is to be evaluated in the light of the Regulations annexed to the Fourth Hague Convention of October 18, 1907, which replaced the Regulations annexed to the Second Hague Convention of July 29, 1899, as the code of international legal rules governing the conduct of war and the powers of States

in belligerent occupation. Although the Convention of 1907, unlike that which it replaced, has been neither ratified by Italy nor rendered executory in Italy by statute, it is to be treated as having become part of our municipal law, so far as it is not repugnant to the latter, as a result of a process of automatic incorporation. Such incorporation took place, moreover, even before the entry into force of Article 10 of the Constitution, with its express provision for the reception of general rules of international law, whether customary or conventional in origin. For it is inconceivable that our country should, *qua* a subject of international law, have claimed the benefit of the restrictions that law imposes on belligerents and the rights it accords them (restrictions and rights, incidentally, already explicitly referred to in our law even before the entry into force of the Constitution as a result of the enactment of Royal Decree No. 1415 of July 8, 1938 [promulgating the Italian *Articles of War*]), but should have at the same time intended, by the mere omission of any express recognition of the applicability of such restrictions and rights in relationships between itself and its own subjects, governed by its own law, to free itself from their burden. The highest considerations of consistency and of comity between our country and other civilized States and their citizens thus demand, as decisions of the Court of Cassation authoritatively declare, that it be held that the Convention referred to, in so far as it is not repugnant to any precise rule of positive law, formed part of our municipal legal system even before the enactment of Article 10 of the Constitution.

“Such capacity to impose taxation as the German army was permitted in the occupied area, whether exercised directly or via the agencies of the Italian State, thus depends on and is governed by Article 48 of the Regulations referred to, which provides as follows: ‘If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.’ It is the opinion of writers, and it appears, indeed, from the wording of that Article [48], that the obligation to respect so far as is possible the tax system already in force in the occupied territory, as distinct from the obligation to defray the costs of administration on the same scale as the legitimate Government, does not disable the Occupying Power from imposing new taxes or abolishing or modifying those already in existence. And on this basis, orders of the Occupying Power cancelling customs duties on

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goods imported for military purposes or for the needs of the occupying force may be seen to be justified. But, if the rule laid down in Article 48 is not to be deprived of all force as a provision designed for the protection of the population of the occupied territory, it must be held to require that the imposition of new taxes or the remission of old ones shall be effected by measures of a general character. Fiscal impositions or exemptions effected under colour of the Occupant's power of taxation by particular orders, and creating in effect privileges for individuals prejudicial to the general civil order which the Occupant is bound to maintain, must be regarded as contrary to the international laws of war.

" It follows that the orders for the waiver of customs duties which were made by the German command in favour of Ligabue were irregular in terms of international law; for, as is not disputed, they were made from time to time as requisitions were made upon him, and were not based on any general legislative provision modifying the fiscal system. They were in reality concessions in the nature of privileges such as the international order does not permit. And, having regard to the automatic incorporation of the relevant rules of international law referred to, they clearly may be treated as no less invalid from the internal point of view. In this connection, the argument advanced on behalf of Ligabue that the exemption orders in question exempted not him but the German command from the payment of duty, is to be dismissed. For our customs law provides in Article 752, in order to secure that goods shall not escape from bond, that the concessionnaire of a bonded store held on lease or in private ownership is to be deemed to be the owner thereof and of all that is in it. It is thus upon him that, in the sense of Article 5, the obligation to pay the excise demanded by the State fastens when goods are withdrawn from bond. This obligation is in fact cast upon him, as Article 1 provides, as soon as goods enter bond—which in the instant case was before the occupation began—though the obligation is but to pay such duties as shall be payable according to the tariff in force at the time of withdrawal.

" It follows from the irregularity of the exemption orders upon which Ligabue relies that he is now liable *nunc pro tunc* to pay the sums claimed by the customs administration. For, now that the occupation has ceased, and since the State never lost its sovereignty over the occupied territory, the situation as it was before is restored and irregularities committed by the Occupant outside the scope of his legitimate powers are to be ignored. Nor is the situation altered by the circumstance that the customs authorities tolerated these irregularities under compulsion during the occupation.

"It is scarcely necessary to add that Ligabue cannot resist the payment of duty on the ground of a general waiver of duties on goods delivered from bond for the use of the Germans effected by the directorate-general of customs of the illegitimate Government of Salmò by its Circular No. 3 of January 4, 1944. Such Circular was impliedly annulled by Article 1 (1) of Decree-Law No. 249 of October 5, 1944, and therefore cannot in any way serve to validate the exemption orders relied on by Ligabue, notwithstanding that it might be regarded from the international point of view as an indirect manifestation of the power of the Occupant to legislate in fiscal matters."

[Report: *Giurisprudenza italiana*, 1952, L, 2, 719.]

Belligerent Occupation—Legislative and Administrative Measures of Occupant—Currency Issued by Occupant—Validity Subsequent to Cessation of Occupation—Japanese Occupation of Burma. Case No. 138

DOOLLY *v.* CHAN TAIK.

Burma, Supreme Court.

June 29, 1950.

THE FACTS.—During the Japanese occupation of Burma, proceedings were taken to redeem certain property from an equitable mortgage created in 1941. The plaintiff deposited Japanese military notes in court in full payment on March 8, 1945. On the basis of this deposit the City Court of Rangoon, on April 23, 1945, made a final decree for redemption. After the re-occupation of Rangoon by forces of the lawful Government, the High Court allowed an appeal by the defendant and held that payment into court in Japanese military notes did not suffice. The plaintiff appealed.

Held: that the judgment of the High Court must be affirmed. The Court said:

"[Appellant's counsel] claims that the enemy in occupation of Burma between the years 1942 and 1945 could have imposed on the inhabitants of the country, so long as the occupation lasted, the obligation to recognize the Japanese military notes at their face value for use as media of exchange, and that the appellant, so long as the occupation lasted, could have claimed as against the defendant that these notes which they were depositing in court were worth their face value. This ingenious contention, however, does not help the appellant to surmount the difficulty inherent in such Japanese military notes not being lawful money. They were no better than tokens, which were given and had value as media of exchange

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so long as the occupation lasted. A full Bench of the High Court of Judicature in *Ko Maung Tin v. U Gon Man* (1947, Ran. 149) held that Japanese military notes were documents with a value in exchange for goods, and had thus a purchasing value. Four of the five Judges held that Japanese military notes never formed part of the currency system in Burma and were not 'money' . . . Nothing has been said before us on behalf of the appellant to justify our dissenting from the view held by the Full Bench of the High Court of Judicature. With the re-occupation of Burma by the lawful Government, Japanese military notes became worthless and were not recognized by the lawful Government as having any value after the re-occupation. If, then, Japanese military notes were not 'money', the deposit into the City Court of Rangoon of these notes on March 8, 1945, cannot, in itself, have the effect of discharging the obligation under the mortgage.

"It is true that if, following the deposit into court, such deposit had been accepted by the defendant, such acceptance may . . . by reason of section 4 of the Japanese Currency (Evaluation) Act, 1946, have the effect of releasing the plaintiff from his liability. . . . But we see no justification for extending the rule to cover a deposit into court. . . .

"It is not relevant to the enquiry that so long as military occupation lasted, the military commander could, by the exercise of irresistible force, have compelled acceptance of [Japanese] military notes at their face value. To contend . . . that the City Court of Rangoon on March 8, 1945, could not, without laying itself open to such pains and penalties as were held out by the military ordinance relating to military notes, have refused the deposit of such notes in court, is to beg the question. Inherent in the contention is the proposition, which we have rejected, that the military commander could have validly imposed a parallel currency system and equated such currency to the lawful currency of Burma."

[Report: *A.J.* 45 (1951), p. 387.]

Belligerent Occupation—Rights and Duties of Occupant—Liability of Occupying Power—Personal Injuries Caused to Inhabitants of Occupied Territory—Whether Proof of Negligence Required—Whether Damages Payable for Pain and Suffering.

See Case No. 147 (*Personal Injuries (Occupied Germany) Case*).

Belligerent Occupation—In General—Introduction of Occupation Currency—Discharge of Prior Debt—Rate of Exchange.

See Case No. 33 (*Nicolò v. Creni*).

iii.—Respect for Private Property. The Public Property of the Enemy State. Requisitions and Contributions

Belligerent Occupation—Requisition of Private Property—Right of User of Property Allotted to Third Party by Occupant—Subsequent Loss of Property—Liability of Third Party to Owner. **Case No. 139**

LOSS OF REQUISITIONED MOTOR CAR (GERMANY) CASE.

*German Federal Republic, Federal Supreme Court.
February 13, 1952.*

THE FACTS.—The plaintiff's motor car was requisitioned by the American army of occupation immediately after the arrival of the United States forces in Germany. Thereafter, the American forces allotted the car to the defendants, who paid an agreed sum of money (referred to as "rent") to the plaintiff in respect of the use of the car. While it was in the defendant's possession, the car was stolen. The plaintiff now claimed damages from the defendants for the loss of his property.

Held: that, notwithstanding that the car had been allotted to the defendants by the Occupant, the relationship between the plaintiff and the defendants was that of bailor and bailee, and as the defendants had negligently failed in their duty of care as bailees they were liable to the plaintiff in damages. The Court said:

"The question whether the plaintiff remained the owner of the car notwithstanding the measures taken by the American forces, has to be answered in the affirmative. It is not disputed that the car was never used by the German army. Having regard to the fact that the car, as has been stated by the defendants, was requisitioned immediately upon the arrival of the Americans, the question need not be determined whether the relations between Germany and the victorious Powers during the period after the capitulation were governed by the Hague Regulations. While active hostilities were in progress and while the existence of German governmental authority was recognized by international law, the Hague Regulations applied. According to Article 53 (2) of the Hague Regulations, privately-owned means of transport which have been requisitioned by the army of occupation must be restored at the conclusion of peace. It follows that requisition of such property may not serve the purpose of expropriation but only of user, with the result that the person affected thereby does not lose his right of ownership.

"As a result of the allocation of the car to the defendants,

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there arose a duty of care between the latter and the plaintiff. In the absence of any relationship of supremacy and subordination between the parties this duty of care cannot be qualified as a bailment of public law. The legal notion underlying the general acceptance of bailments of public law must, however, operate in the present case because the car which was originally requisitioned for the use of the American Army was subsequently allotted to the defendants for their use by means of a sovereign act. The defendants negligently failed in their duty of care by not taking any steps to safeguard the car, and for this omission they are liable."

[Report: BGHZ, 5, p. 124.]

Case
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Belligerent Occupation—Respect for Private Property—Damage to Private Property by Armed Forces of Occupant—Compensation Provided by Occupant—Payment of Compensation Effected by Authorities of Occupied Country—Conditions Governing Payment Imposed by Municipal Authorities—Whether Municipal Courts Competent to Determine Legality of Conditions.

TROST *v.* FEDERAL MINISTRY OF FINANCE.

Austria, Administrative Court.

January 9, 1952.

THE FACTS.—The property of the appellant, an Austrian national, was damaged by members of the British army of occupation. The appellant received no compensation but was paid a small sum of money, described as rent, for the use of his property. Subsequently, the British occupation authorities remitted a sum of money to the competent Austrian provincial authority, and the latter informed the appellant that this money would be handed to him on condition that he waived all further claims. The appellant refused to accept this condition, which was upheld by the Ministry of Finance. He now appealed against the decision of the Ministry to the Supreme Administrative Court. It was contended on his behalf that the latter Court was competent to determine the question whether a condition imposed by the Austrian authorities could lawfully be imposed in accordance with Austrian law. On behalf of the Ministry, it was contended that the provincial authority had not acted in the execution of Austrian law but as an agent of the Occupant, and that the Court was therefore not competent to hear the appeal.

Held: that the Austrian provincial authority had acted as an agent of the Occupant, and that the Court was therefore not competent to hear the appeal. The Court said:

"There is no Austrian rule of law which provides for the jurisdiction of an Austrian authority to adjudicate upon claims for compensation against an Occupying Power in administrative proceedings. Accordingly, where the Austrian authorities lend their assistance, by order of the Occupying Power, to the settlement of claims of this kind, they do not act in the execution of any Austrian legal provision but as an extended arm of the Occupying Power. Decisions made by them in that capacity in accordance with rules prescribed by the Occupying Power are not decisions against which an appeal lies to this Court. . . . For these reasons the appeal must be rejected on the ground that this Court lacks jurisdiction."

[Report: Vw GH (F), 7 (1952), p. 20.]

Belligerent Occupation—Requisition of Private Property by Occupant—Property Comprising Wreck in Navigable River—Liability of Owner under Municipal Law to Remove Wreck—Whether Liability Enforceable at Suit of Municipal Authorities. **Case No. 141**

CONTINENTALE MOTORSCHIFFFAHRTS A.G. *v.* FEDERAL
MINISTRY OF TRANSPORT.

Austria, Supreme Court.
January 31, 1952.

THE FACTS.—A vessel owned by the appellants was sunk in the Danube in the course of belligerent operations during the Second World War. The wreck remained where it had been sunk until 1950, when the Prefect of Vienna called upon the appellants to remove it in accordance with an Austrian law which provided that wrecks constituting an obstacle to navigation must be removed by their owners. Between the date when the vessel was sunk and the date when the appellants were called upon to remove the wreck, the appellants' shipyard and all ships belonging to them had been requisitioned by the Soviet army of occupation. The appellants therefore contended that as by virtue of such requisition they had been deprived of their right to exercise control over their property, they were not liable to remove the wreck. They further contended that, rightly or wrongly, their property had been classified as "German property" within the meaning of the Allied Control Agreement of June 28, 1946, which provided that until final determination by the Allies as to whether any property was "German property", they, as owners, were precluded from exercising any control over the wreck, and that for this reason also they were not liable to remove it. On behalf of the Austrian

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Contd.

authorities it was contended that, notwithstanding the requisition of the property by the Soviet army of occupation and the uncertainty as to whether the wreck was "German property", the appellants were the owners thereof and therefore liable to remove it.

Held: that, although the contention of the authorities to the effect that, regardless of the Control Agreement of June 28, 1946, the appellants were in law still the owners of the wreck, was correct, the appellants were not liable to remove property which the Occupant had requisitioned; neither the Austrian executive authorities nor the Austrian courts were entitled to issue instructions to an owner of property which were at variance with the Occupant's expressed intention that the owner should not be entitled to exercise control over such property. Accordingly, the appeal of the owners must be allowed. The Court said:

"The question as to whether the property of the appellants falls within the definition of the term 'German property' is irrelevant in so far as concerns the determination of the present right of ownership in this property. The international agreements of the Allies governing the fate of German assets in Austria have not, in the absence of a treaty concluded with Austria, become part of Austrian law. Nor does the Agreement of June 28, 1946, which is directly binding on the Austrian Government and authorities, contain any provision whereby such assets are vested in another owner. The Agreement merely contains a provision prohibiting any right of disposal in respect of such property without the consent of the Allied Commission. Austrian law itself does not contain any provision depriving former owners of property which falls within the definition of German property. . . . The view of the respondents that this wreck is the property of the appellants does not, therefore, conflict with the information contained in the file. The appellants, however, contend that their right to dispose of their property, including this wreck, has been taken from them as a result of an order issued by the Russian Occupant in the latter's Zone of Occupation. This Court is of opinion that this contention is decisive. We cannot deal with the question whether the measures taken by the Occupant on the basis of the Potsdam Agreement, which was concluded between the Allies on August 2, 1945, resulted in a transfer to the Occupant of the right of ownership in assets situate in the Soviet Zone of Occupation. The Administrative Court is not called upon to determine the legality of measures taken by the Occupying Power. On the other hand, in determining the legality of administrative measures taken by the Austrian authorities,

the Court must pay due attention to the factual circumstances arising from measures of the Occupying Power. These measures must be taken into consideration when applying Austrian law. The Court cannot hold that it is in accordance with the relevant Austrian law to give to the owner of a shipwreck, the right of control over which has been taken from him by the Occupying Power, an order to remove the same because, as matters now stand, he cannot obey such an order without infringing the orders of the Occupying Power. The law on which the respondent authority relies was enacted at a time when the legislature was entitled to proceed on the assumption that the owner would retain the right of control over his property. It can therefore only be interpreted in such a way that factual circumstances of the kind here referred to run counter to its application. . . . For these reasons the administrative decision under appeal must be revoked."

[Report: Vw GH (A), 7 (1952), p. 83.]

Belligerent Occupation—Respect for Private Property—War Booty—Sale of Booty to Inhabitant of Occupied Country—Whether Purchase Constitutes Notional Import from Foreign Country—Liability of Purchaser for Duty—The Law of Austria. **Case No. 142**

NEUBAUER *v.* TREASURY DEPARTMENT OF THE PROVINCE OF CARINTHIA.

Austria, Supreme Court.
April 30, 1952.

THE FACTS.—The appellant purchased two motor vehicles which had previously formed part of a store of vehicles taken as booty by the British armed forces in Austria. The sale was effected by the Austrian authorities, who acted as agents of the Occupant. The appellant was subsequently assessed as being liable to pay a form of customs duty which could only be levied on goods imported from abroad, the contention of the Austrian customs authorities being that the vehicles had entered Austrian territory at the moment when they ceased to be under the control of the Occupant (or the Austrian agency acting on the Occupant's behalf). The appellant contended that there was no rule of law which provided that goods under the control of the Occupant were notionally outside the territory of Austria, and that accordingly the vehicles had always been in Austria, with the result that they could not be deemed to have been imported into Austria when possession thereof was transferred to him.

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Held: that the vehicles had always been in Austrian territory and that the appellant was not, therefore, liable to pay duty thereon. The Court said:

"The authorities would have been entitled to levy duty if these goods had been imported into the Republic of Austria and had thus become liable to duty. On the other hand, if the goods were already in the territory of the Republic of Austria they are Austrian goods, and their seizure by the foreign Occupant on Austrian territory could not be likened to an import transaction entailing liability to duty. Austrian customs law does not acknowledge the existence of a legal presumption that goods in the depot of a foreign Occupant situate in Austria and containing booty have been imported into Austria by the Occupant. . . ."

"As in this case there is no finding of fact whatever as to whether the two vehicles, on which duty has been levied by reason of their transfer from the depot of the Occupant into the ownership of the appellant, were imported into the Republic of Austria by the Occupant, the decision under appeal must be revoked."

[Report: Vw GH (F), 7 (1952), p. 169.]

Case
No. 143

Belligerent Occupation—Respect for Private Property—Requisitions—Claim by Owner of Requisitioned Land—Whether Claim Lies against Government of Occupied Country—Article 52 of the Hague Regulations.

SOVIET REQUISITION (AUSTRIA) CASE.

Austria, Constitutional Court.

March 27, 1952.

THE FACTS.—The plaintiffs, owners of a hotel requisitioned by the Soviet army of occupation, claimed compensation from the Republic of Austria (defendants herein) for the use of their property by the Occupant. It was contended on their behalf that as the Occupant had failed to pay rent for the use of their property and as by virtue of Article 52 of the Hague Regulations they were entitled to receive rent, the liability of the Occupant must fall on the Republic of Austria; and further, that according to general principles of law the burdens imposed by the Occupant must fall equally upon all the inhabitants of an occupied country and that they, the plaintiffs, were therefore entitled to claim compensation from the Republic of Austria. On behalf of the Republic of Austria it was contended that the Hague Regulations conferred rights only on States, and not on individuals, and that in any event Article 52 thereof imposed a duty only on the Occupant, and not on the occupied country;

and further, that there were no general principles of law which required that the burdens imposed by the Occupant must fall equally upon all the inhabitants of an occupied country.

Held: that the plaintiffs themselves could not derive any benefits from the operation of Article 52 of the Hague Regulations, which, in any event, did not impose any liabilities upon the Government of an occupied country *vis-à-vis* its inhabitants, and that the Republic of Austria was accordingly not liable to pay compensation to the plaintiff. The Court said:

“According to the Hague Regulations, the plaintiffs cannot successfully assert a claim against the defendants. Quite apart from the fact that, except where otherwise provided, an international treaty confers rights and imposes duties only on subjects of international law, *viz.*, on the States parties to the treaty, the following considerations have to be borne in mind: Article 52 of this Convention draws a distinction between the supply of goods and services. Goods must, as far as possible, be paid for in cash, alternatively receipts must be given in respect thereof and payment made as soon as possible. It is within the discretion of the Occupant to do the one or the other. Neither this nor any other provision of the Hague Regulations, however, imposes a duty on the occupied State to compensate its inhabitants in respect of goods which they have been compelled to supply to the Occupying Power. There can be no doubt—and this is conceded by the plaintiffs—that the requisition of the plaintiffs’ property does not constitute services required from the plaintiffs, *viz.*, the personal performance of work, but compels the supply of goods within the meaning of the said Article 52. According to the Hague Regulations, only the Occupying Power is under a duty to pay for goods supplied. Having regard to the fact that the Treaty is silent on the matter, the occupied State can be compelled to pay compensation only if, and to the extent that, it has undertaken such a liability by virtue of its own municipal law. There can be no doubt that there is no Austrian law providing for any such duty to pay compensation.

“Lastly, the plaintiffs rely in support of their claim on general principles of law. They contend that the costs of occupation fall on the population of the occupied country from the beginning, and therefore have to be borne by the occupied State. This is not correct. It follows clearly from Article 52 of the Hague Regulations that the Occupying Power is entitled directly to demand contributions from individual inhabitants of the occupied State. The extent to which the burden has to be taken off the shoulders of the individual inhabitants immediately affected and distributed among the

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population in general is nowhere referred to in the Treaty; it is a matter for municipal legislation. This contention, therefore, cannot—any more than the other contentions—result in the plaintiffs' claim being successful, because in this case also there is no rule of municipal law which would allow such a claim to be recognized."

[Report: Vf GH, 17 (1952), p. 130.]

Case
No. 144

**Belligerent Occupation—Respect for Private Property—
Article 53 of Hague Regulations—Sale of Private Property
Abandoned by the Enemy.**

RANSOM PHILIPPINE CORPORATION *v.* PUZON AND LAZO.

Philippines, Supreme Court.
November 29, 1952.

THE FACTS.—The plaintiff owned a car which was requisitioned by the Japanese forces in the Philippines in July 1944. Shortly after the liberation of that country, the defendant Puzon found the car abandoned in a creek. With the engine of this vehicle and parts procured from other sources, he built a truck, which he registered in his own name. Subsequently, he sold the truck to the defendant Lazo. The plaintiff brought this action to recover the truck. The defendants contended that the Japanese military forces had acquired title to the car, and that when they abandoned it it became *res nullius*. The defendant appealed from the judgment given for the plaintiff.

Held: that the judgment of the Court below must be affirmed. The Occupying Power has the right to seize private property for military purposes, but must return it at the cessation of hostilities. The taking by the military authorities therefore did not divest the plaintiff of title to the car. The Court said:

"It is next alleged that the appellee is not entitled to recover its car, because the taking of it by the Japanese military, being legal and permissible (*sic*) under the rules of war, divested said appellee of title to the car and of recourse against subsequent possessors in good faith. Reliance is placed on a decision of this Court in the case of *Eufresina Roxas v. Jose Chua*, CA-G. R. No. 2681-R, October 6, 1949, where, following the doctrine laid down in the case of *Taylor v.*

Nashville and Chattanooga RR. Co., Tenn. 464,¹ it was held that an owner whose truck was commandeered by the United States Army which issued a corresponding receipt for it, neither lost nor was illegally deprived of such truck within the meaning of Article 464 of the old Civil Code so as to allow him to recover under that article from a subsequent possessor in good faith. In brief, the appellants take the stand that they are possessors in good faith and must be preferred to one who, though a former owner, has lost title to the thing because it was requisitioned by a military occupant. The application of the cited case to the one at hand, however, is barred by two considerations. First, as the appellee points out, there is no fair analogy between the *Roxas* case and this one. In that case, the taker was the United States Army, an agent of the sovereign authority in the Philippines at the time; in this one, the taker was the Japanese Army, a military power in temporary occupation of the country. A taking by [the] one may not produce the same effects as a taking by the other. Second, later decisions of the Supreme Court have unqualifiedly held that a military occupant, while it is empowered to seize private property for military purposes, has no power to confiscate such property. In other words, it may take, but it has the duty to return what is taken at the cessation of hostilities. In the case of *Enriquez v. Manuel*, 43 Off. Gaz., No. 1, 105, it was held:

‘The seizure of the car by the enemy force, and afterwards by a unit of Filipino guerrillas, cannot be an act transferring the ownership; therefore, the plaintiffs did not lose their ownership and they have the right to recover it from any person holding it. The Court did not err by ordering its return to the plaintiffs or payment of its reasonable value.’ [In Spanish in the original.]

“And in *Noceda v. Escobar*, G. R. No. L-2939, August 29, 1950, it was held, citing article 53 of the Hague Conventions of 1907, that:

‘The second paragraph of Article 53 (of the Hague Conventions of 1907) above quoted was quoted by the trial Court in support of its view that the Japanese Army was authorized under international law to seize the vessel in question. And we think

¹ *Taylor v. Nashville and Chattanooga Railroad Co.* (1868), 47 Tenn. (6 Cold.) 646, was an action to enjoin the removal by an assignee of the United States Government of firewood previously cut and stacked on the plaintiff's land by agents of the United States Army during the Civil War, in territory under control of the United States Army. The Court held:

“... if movable property is thus taken in good faith by the agents of the Government, for the public use, with intent to appropriate it absolutely and permanently to such uses, the title would vest in the State upon such taking; and though it might afterward be found that it was not necessary actually to consume the property in such use, still, the title having once vested in the State, would not revert in the original owner upon the occasion for its use ceasing.” (*Ibid.*, at p. 654.)

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No. 144
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that was correct. But we are clearly of the opinion that the trial Court erred in holding that the Japanese Army could and did lawfully confiscate said vessel. Although the regulations quoted authorized the seizure of the vessel in question, they did not authorize its confiscation. On the contrary, it is expressly provided therein that the things seized "must be restored at the conclusion of peace and indemnities paid for them." It is clear, therefore, that the title to the vessel in question did not pass to the Japanese but remained in the owner, the plaintiff herein. In other words, said vessel did not become enemy property and was not such when the PCAU sold it to Vicente Asuncion. Hence said sale was not valid as against the plaintiff, and the defendant acquired no valid title to said vessel by virtue of his purchase from Vicente Asuncion.'

"The latter cases are clearly more authoritative, not only because they come from a higher source, but also because they present almost exactly the same facts with which the Court is now faced. Following the rulings laid down therein, these premises may be laid: (1) the taking of the car by the Japanese military did not pass title from the appellee to the Japanese Army or Government; (2) its subsequent abandonment by the retreating enemy did not make it *res nullius*, subject to appropriation by any finder; (3) the owner has a right to recover it from any subsequent possessor, whether the latter is a possessor in good or bad faith.

"Finally, with the question why, if the appellee lost a car, he should recover a truck, the appellants bring up the question of accession. . . . Under the law, when two movables belonging to different owners are, without bad faith, joined together to form a single object, the owner of the principal thing acquires the accessory. . . . (T)he heart of a motor vehicle is the motor. . . . By this token, the appellee, being the owner of the engine, is entitled to the whole truck, subject, of course, to the obligation of indemnifying the appellants for the value of the accessories."

[Report: *Official Gazette*, 49 (1953), p. 598.]

Case **Belligerent Occupation—Rights and Duties of Occupant—**
No. 145 **Requisitions—Articles 52 and 53 of the Hague Regulations.**

A/S SOBRAL *v.* NORWEGIAN CROWN.

Norway, Supreme Court.

March 26, 1952.

THE FACTS.—The claimant Company had a ship under building at a Norwegian shipyard. Subsequent to the German invasion of Norway, the ship was requisitioned by the German authorities after it had been launched. The German authorities

paid compensation to the Company. The Company never admitted that the ownership had passed to the German authorities. After the liberation of Norway the ship was taken over by the Allies. She was then lost at sea in the course of mine-sweeping operations. The Company now claimed compensation from the Norwegian Government on account of the loss of the ship. One of the questions before the Court was whether the Company had retained the ownership of the ship. The Company claimed that it remained the owner of the ship since the original German requisition was unlawful as being contrary to Articles 52 and 53 of the Hague Regulations.

Held: for the plaintiffs. Mr. Justice Berger (for the Court) said:

“ . . . In my opinion one must hold that the requisition of the ship was illegal from the point of view of international law as far as requisition for use is concerned. The fact that the Germans paid the building price cannot alter this fact. Sobral, which was actually put under administration by the Germans, had not consented to have the ownership transferred to the Germans. Sobral has therefore all the time been the rightful owner. . . . ”

[Report: *Rt.*, 1952, p. 354.]

NOTE.—The value of this judgment is impaired, for the purpose of the *International Law Reports*, by the absence of reasons substantiating the invalidity of the requisition of the ship. However, it has been thought that this brief report of the case may be of use. —[ED.]

War—Occupation of Enemy Territory—Respect for Private Property—Sequestration of Private Property on Racial Grounds. Case No. 146

LANCKSWEERT *v.* BARUCH.

Belgium, Cour de Cassation.

September 25, 1952.

THE FACTS.—During the German occupation of Belgium a house belonging to the respondent was placed under sequestration by the German authorities on the ground that it was Jewish property. As the result of the institution of proceedings by some creditors of the respondent, the house was sold by auction to the appellants. The sale was made in the name of the respondent and authorized by the German sequestrator. After the war the respondent successfully brought an action for the annulment of the sale, on the basis of Article 2 of a Decree-Law of January 10, 1941, which provided that any disposal or

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Contd.**

bailment of movable or immovable property, which had been the object, after May 10, 1940, of confiscation, seizure, forced sale or any other measure on the part of the enemy infringing private property, was null and void. This was an appeal from that decision. It was contended on behalf of the appellant that the Law of January 10, 1941, applied only to transfers effected in the first place by the enemy or under his orders.

Held: that the appeal must be rejected. The Court said:

"It is necessary, but also sufficient, for the annulment of a transfer, that it was the result of a measure of dispossession taken by the enemy. In its judgment of April 19, 1950, the Court of Appeal found as a fact—and there is no appeal from this finding—that the transfer in this case was the result of the measure of dispossession taken by the enemy with regard to respondent's property. Article 2 of the Law of January 10, 1941, does not become inapplicable merely by virtue of the fact that the transfer, though made without the consent of the dispossessed owner, was made in his name. Moreover, the fact that the sale was made on judicial authority also does not make that Article inapplicable.

[Report: *Pasicrisie belge* (1953), I, p. 15.]

Belligerent Occupation—Respect for Private Property—Requisitions—Payment for.

See Case No. 97 (*Etilmar Société Anonyme of Casablanca v. United States*).

iv.—Inhabitants. Services. Deportations. Hostages

**Case
No. 147**

Belligerent Occupation—Treatment of Inhabitants—Liability for Personal Injuries Caused by Personnel of Occupying Power—Whether Proof of Negligence Required—Damages Recoverable.

PERSONAL INJURIES (OCCUPIED GERMANY) CASE.

German Federal Republic, Administrative Court of Appeal of Münster.

April 9, 1952

THE FACTS.—The plaintiff, a German citizen, sustained severe personal injuries when a motor vehicle of one of the Occupying Powers in occupied Germany collided with him. The "Claims Panel" of the Control Commission for Germany (British Zone) acknowledged the plaintiff's claim to be well-founded, and in accordance with the relevant legislation of the British occupation authorities the amount of the damages recoverable by the plaintiff had to be assessed by the German

authorities. The latter refused to award damages in respect of the plaintiff's loss of earnings and pain and suffering. The administrative court allowed the plaintiff's appeal so far as concerned the refusal to award him damages for loss of earnings, but dismissed his appeal against the refusal to award him damages for pain and suffering. The plaintiff appealed again.

Held: that, regardless of whether the Hague Regulations of 1907 were applicable to the occupation of Germany, the liability of the Occupying Power for injuries caused by personnel under its command was, under customary international law, absolute and not dependent on proof of negligence, that such absolute liability included a legal duty to make good all damage caused, including so-called incorporeal damage, and that plaintiff was therefore entitled to an award of damages in respect of pain and suffering. The Court said:

"The plaintiff's claim for damages derives not only from public municipal law, but also from international law. By virtue of Article 3 of the Hague Regulations of 1907 a State is liable for all acts [*viz.*, violations of the Regulations] committed by persons belonging to its armed forces. According to the wide wording of Article 3, which has been chosen in the interests of the protection of the civilian population, fault on the part of the person who has caused the damage is not a prerequisite of liability. It is therefore an undisputed principle of the doctrine of international law that Article 3 provides for the absolute liability of the Occupant in respect of acts committed by members of its armed forces. Within the framework of this absolute liability for which international law provides, a State is under a duty—according to the views of writers on international law which have, however, not yet been universally accepted—to pay compensation for 'incorporeal' damage.

"We need not determine the question whether the Hague Regulations are fully applicable to the present occupation of Germany. In any event, international customary law, which forms the basis of the Hague Regulations and which has developed from the uniform views and practice of all civilised States and has thus become a rule of international law, is applicable to the extent that circumstances and the balance of interests are the same as in the case of belligerent occupation. This view is shared by the Occupying Power—at any rate, so far as concerns absolute liability for damage caused by the Occupying Power—and must therefore form the basis of the interpretation of its laws and ordinances. . . . The question, which hitherto has not received a uniform answer in the doctrine of international law, as to whether compensation for

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No. 147
Contd.

damage caused within the ambit of absolute liability includes compensation for 'incorporeal' damage, in accordance with Article 3 of the Hague Regulations, has now been answered affirmatively so far as concerns the territory where the law relating to damage caused in the course of occupation is in operation. According to that law, compensation can be awarded for damage caused to the injured person which is not financial damage, provided that, having regard to the severity and effect of the injury, such compensation is indicated for reasons of equity. Fault [negligence] is not here a prerequisite of an award in respect of pain and suffering."

[Report: NJW, 5 (1952), p. 1030.]

C—WARFARE AT SEA

II.—Visit, Search, Capture and Destruction

ii.—Of Neutral Merchantmen

Case
No. 148

Prize Law—Search and Capture—Neutral Vessel Diverted for Examination—Whether Reasonable Grounds for Suspicion—Whether Unreasonable Delay Before Release—Action for Damages for Delay.

THE PATRAI.

England, High Court of Justice, Admiralty Division sitting in Prize.

(Lord Merriman P.)

May 21, 1952.

THE FACTS.—This was a claim by Hellenic Lines, Ltd., owners of the Greek steamer *Patrai*, against the Crown for damages for detention of the vessel for twenty-three days in Weymouth in 1939, after the outbreak of war. They contended that an unreasonable time had been taken to decide whether the cargo included contraband.

In October 1939, the *Patrai* was on a voyage from the Levant and Portugal to Antwerp and Rotterdam with a general cargo. On October 26, their London agents sent to the Ministry of Economic Warfare in London copies of the cargo plan, manifests and bills of lading for most of the cargo, including two consignments of emery stone. On November 1, 1939, she called at Weymouth for examination. Further documents were supplied at the request of the Ministry, the ultimate destinations of the emery stone being declared as Rotterdam and Vlaardingén. All the requirements of the Ministry had

been complied with by November 6, but the vessel and cargo were not released until November 23 and she resumed her voyage on November 24.

The plaintiff contended that the delay was unreasonable because there were no grounds for suspicion, the cargo being consigned to named consignees.

Emery stone was absolute contraband within Schedule I of the Proclamation of September 4, 1939, relating to contraband of war. It was known that emery stone was urgently needed by the Germans in 1939 for war purposes, and it appeared that these two consignments of emery stone, together with another consignment in another vessel which arrived in the Channel about the same time, represented more than half the total imports of emery stone into Holland in 1938 and three-quarters of the normal imports into Holland from Greece.

Held: that the case must be dismissed. There were ample grounds for suspicion which justified searching inquiries being made. The ship was properly brought into port in accordance with the belligerent right of visit and search, and the inquiries made by the Crown before releasing the vessel were not unreasonable or unduly prolonged.

Lord Merriman P., after examining the facts of the case in considerable detail, continued: "It remains to consider the principles to be applied. I do not think that these are at all obscure. First, it was laid down in the *Zamora* (No. 1), 2 B. & C.P.C. 1, at p. 28 . . . that the practice of bringing vessels into harbour for the purpose of visit and search was justifiable, because search at sea is impossible under the conditions of modern warfare. The propriety of the practice was not disputed in this case. But just as it was there held that from the point of view of international law it would be a mistake if this practice were allowed to give rise to rights which could not arise if the search took place at sea, equally it would, in my opinion, be a mistake if it were allowed to deprive the Crown of existing rights, or expose it to new liabilities.

"Secondly, it is well settled that where there is probable cause for seizure, the Procurator-General is not to be held liable for bringing the case to adjudication, though unsuccessfully: the *Falk*, 3 B. & C.P.C. 955; 10 Ll.P.C. 25. Moreover, the test of 'probable cause' or reasonable grounds for suspicion is not confined to what was known at the time of the detention, still less to what was then actually known to the individual officers concerned, but what is known by the officers of the Crown generally: the *Falk*, *ibid.* at pp. 960 and 42. But though after-acquired knowledge is available to justify seizure

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Contd.

in Prize, arbitrary or capricious arrest, ventured on the hazard that a case for conviction may turn up, may involve liability for damages (*ibid.*, at pp. 965 and 49). But if it is blame-worthy to venture on a capricious arrest on the chance that something may turn up, it follows that those with whom rests the decision, on behalf of the Crown, whether to seize or not, must be allowed reasonable time to consider the information on which this decision is to be based. In the same case, with reference to the preparation and presentation by the Crown of a case for condemnation, Lord Sumner said (at pp. 963 and 47): 'The greater the mass of transactions to be inquired into, the more astute the schemes of contraband traders, the more enlarged the available sources of information and the means of making it subserve the discovery of truth, the more is it necessary that the Procurator-General should have all proper opportunity of preparing the case for submission to the Court, free from the insistent pressure of a liability in damages and costs, so long as he has not been guilty of delay for indirect objects or from mere neglect, and has materials which are proper to be examined judicially'.

"Similar considerations seem to me to apply to what may be called the period of visit and search while the decision whether to seize or not is still in suspense. Manifestly, the mere fact that, after careful inquiry into all available sources of information, it was decided that there was no probable cause for seizure, cannot make the detention involved by the inquiries unreasonable, or give a right to damages. Likewise, it cannot, in my opinion, be the case that because by a certain date formalities required by the Ministry of Economic Warfare are complied with, the Crown is precluded from recourse to other sources of information at the risk of being charged with undue delay thereafter, as is suggested by paragraphs 6 and 8 (d) of the petition. It is right to add that both these contentions were expressly disclaimed by Counsel for the plaintiffs. Indeed, to hold that the Crown could not go behind the documents, albeit these are in the form prescribed by its own officers, would be a very serious derogation from its belligerent rights. In the *Zamora* (No. 2), 3 B. & C.P.C. 919 8 Ll.P.C. 367, a case in which all the documents were in order, Lord Sumner said (at pp. 921 and 368): 'The documents were genuine enough—that is to say, they came into existence at the time and for the purposes for which they were ostensibly created.'

"But he added that the case proved what patience and tenacity are needed in probing to the bottom an apparently straightforward case, and how liberal and even indulgent a Court of Prize must sometimes be in granting the time required

to exhaust all the means at the captor's disposal for discovering the truth.

“Reliance is placed on what I am reported as having said in the *Jurko Topic*, 1 Ll.P.C. (2nd) 89, at p. 93, that in these matters the interests of the shipowners must be considered and not only those of the captors or of the cargo-owners. I adhere to this, as it seems to me to accord with Lord Stowell's observations in the *Washington*, (1806) 6 C.Rob. 275. With reference to the analogous question of the convenience of the port to which a captured vessel had been taken by a privateer, he said: ‘For instance, that owners of privateers may elect their own port, is but a reasonable advantage in itself, when kept within proper limits, and not suffered to predominate over the interests of other persons, and more especially over those general purposes of public justice, to which the Court is principally bound to attend. The privilege of electing their own ports is a convenience, which may be allowed *coeteris paribus*; and it is one in which the Court will be disposed to support them, when it does not become the cause of greater inconvenience to others.’

“Once it is conceded that the declarations of the receivers against enemy destination are not conclusive, the complaint that the representatives of the Crown took too long to make up their minds to accept these assurances at their face value appears, on final analysis, to be reduced to saying that if only the reference to the Legation at The Hague had been made when the ship's papers began to arrive on October 26, instead of waiting until the Contraband Control Committee ordered this particular investigation on November 5, and if the Legation staff at The Hague had pursued their inquiries more diligently, without the necessity of a reminder on November 12, anything up to eleven days might have been saved in bringing these inquiries to a conclusion, and therefore the Crown ought to pay demurrage for that period by way of damages. But the argument that if the inquiry at The Hague had begun so many days earlier it would have ended the same number of days sooner seems to me to be an arbitrary assumption which is incapable of verification or refutation owing to the loss of the archives. Not merely does this assumption take no account of the possibility that time was occupied by one line of inquiry leading to another, and so on; it also ignores the point that the Minister's staff at The Hague were not able to give their sole and undivided attention to the inquiries in this particular case, for, as Lord Drogheda points out in his affidavit, the inquiry into this ship was only one of a great number of inquiries which had to be undertaken by the Legation staff, as Holland was the country through which German imports were most likely to

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pass. He rightly emphasizes the care necessary in conducting these inquiries, because it was chiefly upon their results that the Contraband Control Committee relied in arriving at a decision about the detention or release of particular ships or cargoes. Considering the hardship and inconvenience which may be caused to the owners of ships and cargoes by undue precipitancy on the part of the officers of the Crown in deciding to seize, and the liability which may be incurred by the captor in respect of capricious or arbitrary seizure, the advantage to all parties of taking adequate time before making a decision to seize is so obvious that I do not think that the Court should be astute to attach blame to the Crown for acting with extreme caution.

"Doing my best to hold the balance evenly between consideration for the shipowner and cargo-owner, and the belligerent right of visit and search, and the right, and, indeed, the duty of the officers of the Crown to act circumspectly and with due deliberation before deciding to go to the length of seizure in Prize, I am very far from being convinced that the plaintiffs have made out a case of undue detention during any part of the period between November 1 and November 23, 1939."

[Report: 1 Ll.P.C. 1952, p. 339.]

G—NEUTRALITY

Case
No. 149

Neutrality—Qualified Neutrality—Non-Belligerency—Iran as a Co-belligerent during the Second World War—Aliens—Renunciation of Right of Naturalization.

In re MOLO.

United States, District Court, Southern District of New York.
June 3, 1952.

THE FACTS.—The petitioner, a national of Iran, applied in 1950 for naturalization. Section 301 of the United States Selective Service and Training Act provided that if an alien neutral makes application to be relieved from liability for military service, he shall thereafter be barred from citizenship. The Government opposed the petition on the ground that, in June 1943, the petitioner had made such application. The petitioner, admitting that he had so applied, and that he had been deferred on this ground (until after Iran became a co-belligerent, in 1944, when he was deferred for other cause), contended that, at the time of his application, Iran in fact was not neutral.

Held: that Iran was then neutral within the meaning of the Act, and that the Government's recommendation to deny naturalization must be confirmed. The Court said:

"Petitioner now asserts that at the time he filed Form 301, Iran was not a neutral country in fact. However, it clearly was neutral within the terms of the regulation. It did not become a cobelligerent until September 9, 1943. But petitioner challenges the regulation as inconsistent with the statute. He cites definitions of 'neutral' as 'indifferent, impartial', etc., and refers to the fact that after Iran was occupied by Allied troops in August, 1941, it subsequently allowed passage of matériel to Russia, and on January 29, 1942, it entered into a treaty with Russia and Great Britain and broke off diplomatic relations with the Axis Powers. . . .

"Petitioner maintains that 'neutral' in the statute is clear and unambiguous. In 1941, the then Attorney-General Robert H. Jackson, in an address stated:

'Even during the vogue among publicists and textwriters of the theory that all wars were just and all neutrality therefore indiscriminating, modern practice—especially American practice—shows instances of discriminating, qualified neutrality'.
35 Am. Journ. of Int. Law No. 2, p. 351.

"Equivocal actions were performed by 'neutral' nations and have been referred to as instances of 'non-belligerency' or 'benevolent neutrality'. See *Some Current Questions Relating to Neutrality*, 37 Am. Journ. of Int. Law No. 4 at 651; 'Non-belligerency' in *Relation to the Terminology of Neutrality*, 35 Am. Journ. of Int. Law No. 1 at p. 121. Whatever the validity of the various arguments, it is clear that the term was not unambiguous in fact. It is evident that the Congress did not intend to restrict 'neutral' to its narrowest definition. To have done so would have cast an insuperable burden on the Selective Service System to weigh carefully every action by a 'neutral' nation to determine when it superseded the bounds of impartiality or when it returned thereto and to analyse the day by day position of each nation. A definite standard was essential for the efficient operation of the Selective Service System. Congress clearly did not intend to hamper the procurement of manpower in those critical times with such uncertainties. Such a conclusion is quite unlikely.

"The Director of Selective Service adopted the regulation which, for the purposes of the Act, drew a clear-cut line and provided for the efficient and speedy administration of the Act. It clearly protected the rights of 'neutrals'. The Regulation was plainly a fair and reasonable one and consistent with the Act. Under that Regulation, Iran was a neutral nation when the petitioner filed Form 301.

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“ *In re Petition of Ajlouny*, D.C., 77 F. Supp. 327, the Court found that Palestine was not a neutral country and so the petitioner there was not barred by his having signed Form 301. The Court there noted that Palestine was under mandate to Great Britain which was at war; that Palestine was geared to Great Britain under its status; and that there was no change in the relation of the countries when Palestine was later deleted from the list of neutral countries. The regulation was misapplied in that case. See *In re Dweck*, 106 F.Supp. 169, decided by Judge Kennedy of the Eastern District of New York.

“ *Matter of Pinchot*, decision of Judge Irving Kaufman on April 23, 1951, held that Iran was a neutral country within the Act of August 10, 1942, even after its treaty. *Petition of Fatoullah*, D.C., 76 F.Supp. 499, found Iran was neutral in May, 1943. The Department of State, in a letter dated January 25, 1949, took the position that Iran was a neutral for purposes of the Selective Training and Service Act, until its declaration of war.

“ The bar to citizenship was not removed by a subsequent reclassification after Iran became a cobelligerent. *Machado v. McGrath*, U.S.App.D.C., 193 F. 2d 706, at p. 710; *Petition of Fatoullah*, *supra*.”

[Report: 107 F. Supp. 137.]

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